

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(1) INTRODUCTION/201. Forms of gifts inter vivos.

## **GIFTS (VOLUME 52 (2009) 5TH EDITION)**

### **1. GIFTS MADE BETWEEN LIVING PERSONS**

#### **(1) INTRODUCTION**

##### **201. Forms of gifts inter vivos.**

A gift made between living persons (inter vivos)<sup>1</sup> may be defined shortly as the transfer of any property from one person to another gratuitously<sup>2</sup> while the donor is alive and not in expectation of death. It is an act whereby something is voluntarily transferred from the true owner in possession<sup>3</sup> to another person with the full intention that the thing shall not return to the donor. It has been said that there must be an intention on the part of the recipient to retain the thing entirely as his own without restoring it to the giver<sup>4</sup>, but it seems that this is incorrect and that a gift is effective when the donor intends to make it a gift and the recipient takes the thing given and keeps it, knowing that he has done so: the mere fact that the recipient regards the thing given as a loan and intends so to treat it does not by itself prevent the transaction from being effective as a gift<sup>5</sup>.

A post-nuptial settlement, or a settlement made during the subsistence of a civil partnership<sup>6</sup>, is a form of gift, unless made in pursuance of a binding ante-nuptial or pre-registration agreement<sup>7</sup>. Voluntary bonds are debts<sup>8</sup>, and can be enforced against the person creating them or against his estate<sup>9</sup>. A voluntary bond in favour of a trustee for a beneficiary can be enforced by the beneficiary where it is established that there is a completely constituted trust of the chose or thing in action, the benefit of the covenant<sup>10</sup>, but, save in special circumstances (for example where the defendant disclaims any wish that the trustee should be joined), the trustee should be a party to the proceedings<sup>11</sup>.

1 As to gifts made in contemplation of death (gifts mortis causa) see PARA 271 et seq. As to gifts by will see **WILLS** vol 50 (2005 Reissue) PARA 301 et seq.

2 'Gifts then, or grants, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that gifts are always gratuitous, grants are upon some consideration or equivalent': 2 Bl Com (14th Edn) 440. The ordinary primary meaning of 'gift' has been said now to be 'a voluntary transfer of property made without consideration': see *Berry v Warnett (Inspector of Taxes)* [1980] 3 All ER 798 at 811, [1981] 1 WLR 1 at 18, CA, per Buckley LJ; revsd [1982] 2 All ER 630, [1982] 1 WLR 698, HL, without casting any doubt on this dictum. As to what amounts to consideration see **CONTRACT** vol 9(1) (Reissue) PARA 735 et seq. The consideration may be so small that a nominal purchase may be deemed a gift or voluntary settlement: *Howard v Earl of Shrewsbury* (1867) 2 Ch App 760. See *Mansukhani v Sharkey* (1992) 24 HLR 600, CA, where the transfer of a flat by parents to a son in consideration of natural love and affection was held to be a gift and not a purchase for the purposes of the Rent Act 1977 Sch 15 Pt I Case 9 (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 956) notwithstanding that the son had covenanted to keep up the mortgage instalments and had indemnified his parents against their personal liability on their covenants. The description of a transaction by the donor is not a conclusive test whether the transaction is one of gift, but the court may look at the totality of the transaction and regard the supposed gift as part of a commercial sale: *Esso Petroleum Co Ltd v Customs and Excise Comrs* [1973] 1 WLR 1240 at 1246-1247 per Pennycuik V-C; revsd, but not as to this dictum, [1975] 1 WLR 406, CA; further appeal dismissed [1976] 1 All ER 117, [1976] 1 WLR 1, HL. As to the effect of a nominal sum of money as consideration for the purposes of the Land Charges Act 1972 see *Midland Bank Trust Co Ltd v Green* [1981] AC 513, [1981] 1 All ER 153, HL.

3 A person acquiring goods under a hire-purchase agreement under which he is not the owner cannot transfer them by way of gift: *Spellman v Spellman* [1961] 2 All ER 498, [1961] 1 WLR 921, CA. See also PARA 205 note 5.

4 Britton (temp Edward I), Translation by Nichols, vol I p 220. A gift, however, may be conditional: see PARA 251 et seq.

5 *Dewar v Dewar* [1975] 2 All ER 728, [1975] 1 WLR 1532, applying *Cochrane v Moore* (1890) 25 QBD 57, CA, and *Standing v Bowring* (1885) 31 ChD 282, CA.

6 As to the meaning of 'civil partnership' see the Civil Partnership Act 2004 s 1; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 2.

7 See *Goodright d Humphreys v Moses* (1775) 2 Wm BI 1019. Although this decision pre-dates the concept of civil partnerships, the Civil Partnership Act 2004 confers rights on civil partners in all practicable respects, and particularly in relation to financial matters, analogous to those enjoyed by married persons and decisions which on their facts relate only to marriage must be read in the light of this. As to post-nuptial settlements and settlements made during the subsistence of a civil partnership see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 711; as to ante-nuptial and pre-registration agreements see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 712. As to marriage and civil partnership settlements generally see **SETTLEMENTS** vol 42 (Reissue) PARA 628 et seq.

8 Consideration is not essential to constitute a valid bond: see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 103.

9 For the rules as to payment of debts in the case of insolvent estates see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 399 et seq.

10 *Fletcher v Fletcher* (1844) 4 Hare 67; *Re Cavendish Browne's Settlement Trusts, Hornor v Rawle* [1916] WN 341. However, a covenant to settle after-acquired property is only enforceable by parties within the marriage or civil partnership (see note 7) consideration: *Re Plumptre's Marriage Settlement, Underhill v Plumptre* [1910] 1 Ch 609; *Re D'Angibau, Andrews v Andrews* (1880) 15 ChD 228, CA; *Re Pryce, Neville v Pryce* [1917] 1 Ch 234; *Re Kay's Settlement, Broadbent v Macnab* [1939] Ch 329, [1939] 1 All ER 245; *Re Cook's Settlement Trusts, Royal Exchange Assurance v Cook* [1965] Ch 902, [1964] 3 All ER 898. As to who is within the marriage (or civil partnership) consideration see **SETTLEMENTS** vol 42 (Reissue) PARA 661.

11 See *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1 at 13-14, HL; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 61 et seq.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(1) INTRODUCTION/202. Modes of making gifts.

## 202. Modes of making gifts.

A gift *inter vivos*<sup>1</sup> may be made:

- 1 (1) by deed or other instrument in writing<sup>2</sup>;
- 2 (2) by delivery in cases where the subject of the gift admits of delivery<sup>3</sup>; or
- 3 (3) by declaration of trust, which is the equitable equivalent of a gift<sup>4</sup>.

As there cannot be a gift without a giving and a taking, these being the two reciprocal acts which constitute a gift<sup>5</sup>, so it is necessary that the donor should be competent to give<sup>6</sup> and the donee should be competent to receive<sup>7</sup> what is intended to be given. Where, after an alleged gift, dominion over its subject is restored by the donee to the donor, the gift is at an end<sup>8</sup>.

1 See PARA 201.

2 In *Hawksby v Kane* (1913) 47 ILT 96, although the deceased called the instrument a deed, it was treated as a testamentary document and proved. As to deeds etc see PARA 231 et seq.

3 *Re Swinburne, Sutton v Featherley* [1926] Ch 38 at 44, CA, per Warrington LJ (in order to make an effectual gift inter vivos there must be an actual transfer of the subject of the gift or of the indicia of title to it). If unsolicited goods are sent to a person (the 'recipient') with a view to his acquiring them and the recipient has no reasonable cause to believe that they were sent with a view to their being acquired for the purposes of a business and has neither agreed to acquire nor agreed to return them, the recipient may, as between himself and the sender, use, deal with or dispose of the goods as if they were an unconditional gift to him and the rights of the sender to the goods are extinguished: see the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, reg 24(1)-(3); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 657. As to delivery see PARA 237 et seq.

4 See PARA 240 et seq.

5 *Cochrane v Moore* (1890) 25 QBD 57 at 76, CA, per Lord Esher MR.

6 See PARA 204 et seq.

7 See PARA 218 et seq.

8 *James v James* (1869) 19 LT 809.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(1) INTRODUCTION/203. Taxes and duties on gifts.

### 203. Taxes and duties on gifts.

Inheritance tax is payable on lifetime gifts made within seven years preceding death<sup>1</sup>. Certain gifts are exempted from the tax<sup>2</sup>, notably transfers between spouses and civil partners<sup>3</sup>, transfers of value in any one year not exceeding £3,000<sup>4</sup>, transfers of value to any one person in any one year not exceeding £250<sup>5</sup>, certain gifts in consideration of marriage or civil partnership<sup>6</sup>, gifts to charities<sup>7</sup>, political parties<sup>8</sup> and housing associations<sup>9</sup>, and gifts for 'national purposes'<sup>10</sup>. Gifts of property subsequently held for national purposes<sup>11</sup> and transfers of value to employee trusts<sup>12</sup> are 'potentially exempt' from the tax.

A lifetime gift<sup>13</sup> is also liable to capital gains tax, which may be recovered from the donor<sup>14</sup>. There are exceptions in the case of gifts of objects of national interest, gifts of land and buildings for public benefit and gifts to charities, national heritage bodies and housing associations<sup>15</sup>.

No liability to income tax arises in respect of a gift provided for an employee or a member of the employee's family or household if specified conditions are met<sup>16</sup>. Under the 'gift aid' scheme, qualifying donations by an individual to a charity are treated as if the gift had been made after deduction of income tax at the basic rate and the basic rate limit were increased by an amount equal to the grossed-up amount of the gift<sup>17</sup>. The receipt by a charity of a gift which is a qualifying donation is treated for the purposes of the Tax Acts, in their application to the charity, as the receipt, under deduction of income tax at the basic rate for the relevant year of assessment, of an annual payment of an amount equal to the grossed-up amount of the gift<sup>18</sup>.

1 See the Inheritance Tax Act 1984 ss 1, 2(1) (which imposes inheritance tax on the value transferred by a chargeable transfer of value other than an exempt transfer); and **INHERITANCE TAXATION** vol 24 (Reissue) PARAS 407-408.

2 See the Inheritance Tax Act 1984 ss 18-29A; and **INHERITANCE TAXATION** vol 24 (Reissue) PARA 515 et seq; and see eg *IRC v Eversden* [2003] EWCA Civ 668, [2003] STC 822, [2003] All ER (D) 198 (May). The exemption may, however, in some cases be lost: see the Inheritance Tax Act 1984 ss 18(3), 23(2), 24(3), 24A(3), 25(2), 27(2), 29A, 56; and **INHERITANCE TAXATION**.

3 See the Inheritance Tax Act 1984 s 18; and **INHERITANCE TAXATION** vol 24 (Reissue) PARA 515.

4 See the Inheritance Tax Act 1984 s 19; and **INHERITANCE TAXATION** vol 24 (Reissue) PARA 516.

- 5 See the Inheritance Tax Act 1984 s 20; and **INHERITANCE TAXATION** vol 24 (Reissue) PARA 517.
- 6 See the Inheritance Tax Act 1984 s 22; and **INHERITANCE TAXATION** vol 24 (Reissue) PARA 519.
- 7 See the Inheritance Tax Act 1984 s 23; and **INHERITANCE TAXATION** vol 24 (Reissue) PARA 520.
- 8 See the Inheritance Tax Act 1984 s 24; and **INHERITANCE TAXATION** vol 24 (Reissue) PARA 521.
- 9 See the Inheritance Tax Act 1984 s 24A; and **INHERITANCE TAXATION** vol 24 (Reissue) PARA 522.
- 10 See the Inheritance Tax Act 1984 s 25; and **INHERITANCE TAXATION** vol 24 (Reissue) PARA 523. The institutions eligible to receive gifts for 'national purposes' pursuant to this provision are listed in Sch 3: see **INHERITANCE TAXATION** vol 24 (Reissue) PARA 523.
- 11 See the Inheritance Tax Act 1984 s 26A; and **INHERITANCE TAXATION** vol 24 (Reissue) PARAS 525, 528-530.
- 12 See the Inheritance Tax Act 1984 s 28; and **INHERITANCE TAXATION** vol 24 (Reissue) PARA 527.
- 13 'Gift' here means any transaction otherwise than by way of a bargain made at arm's length so far as money or money's worth passes under the transaction without full consideration in money or money's worth: see the Taxation of Chargeable Gains Act 1992 s 282(4); and **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) PARA 104.
- 14 See the Taxation of Chargeable Gains Act 1992 s 282(1), (2); and **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) PARA 104.
- 15 See the Taxation of Chargeable Gains Act 1992 ss 257-259; and **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) PARA 279 et seq.
- 16 See the Income Tax (Earnings and Pensions) Act 2003 s 324; and **INCOME TAXATION**.
- 17 See the Income Tax Act 2007 s 414; and **INCOME TAXATION**. For tax years preceding 2007-2008 see the Finance Act 1990 s 25(6); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1186.
- 18 See the Income Tax Act 2007 ss 520-521; and **INCOME TAXATION**. For tax years preceding 2007-2008 see the Finance Act 1990 s 25(10); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1186. As to payroll giving to charity by employees (to which the cited provisions of the Income Tax Act 2007 do not apply) and the tax relief afforded see the Income Tax (Earnings and Pensions) Act 2003 Pt 12 (ss 713-715); and **INCOME TAXATION**.

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## **(2) DONORS**

### **(i) Persons of Full Age and Capacity**

#### **204. Competency of donors.**

Prima facie any person who is of full age and capacity can dispose by way of gift of any property, or of any estate or interest in it, to which he is absolutely entitled<sup>1</sup>. It is clear on legal and equitable principles that a person of full age and capacity acting freely, fairly and with sufficient knowledge ought to have and has the power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversion, and howsoever circumstanced<sup>2</sup>.

<sup>1</sup> Certain property, however, cannot be alienated: see PARA 221. As a general rule a public pension awarded wholly or partly in consideration of some continuing duty or service, as distinct from one entirely for past

services, cannot be assigned; furthermore, even in the case of pensions given by the Crown or by public authorities for past services, there are many statutory restrictions on assignment: see **CHOSSES IN ACTION** vol 13 (2009) PARA 96.

2 *Kekewich v Manning* (1851) 1 De GM & G 176 at 187-188, CA in Ch, per Knight Bruce LJ; and see *Hall v Hall* (1873) 8 Ch App 430 at 437.

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## 205. Spouses and civil partners.

Save where a presumption of gift may arise<sup>1</sup>, a gift between spouses or civil partners<sup>2</sup> must be established in the same way as a gift between strangers; that is to say it must be made by deed or by delivery<sup>3</sup>, and there must be a clear and distinct act of gift and evidence that a gift was intended, in particular when the claim is made after the death of the alleged donor<sup>4</sup>. An act showing an intention to change the ownership may constitute sufficient delivery, notwithstanding that the chattels continue to be used by the spouses or civil partners in common: the act, however, must be such or be accompanied by such words as to be unequivocal; for if the facts are equally consistent with an intention to make an absolute gift of the property and an intention to allow the other spouse or civil partner to have the use of it, then title does not pass to that other spouse or civil partner<sup>5</sup>.

1 See PARA 244.

2 Although the decisions set out in the text and notes 3-5 pre-date the concept of civil partnerships, the Civil Partnership Act 2004 confers rights on civil partners in all practicable respects, and particularly in relation to financial matters, analogous to those enjoyed by married persons and decisions which on their facts relate only to marriage must be read in the light of this. As to the legal incidents of marriage and civil partnership generally see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 203 et seq.

Husbands and wives were expressly empowered by statute to convey to each other freeholds and choses or things in action (see the Law of Property Act 1925 s 72(2)) and, as they were to be treated, for the purpose of the acquisition of any interest in property under a disposition made or coming into operation after 1925 as two persons, also to make gifts to each other of leaseholds and chattels (see s 37, which also provided that a gift to a husband and his wife and another person or other persons under such a disposition conferred a separate share on each of them, that is, the husband and the wife). No corresponding provision has been made in respect of civil partnerships. As to gifts between persons intending to marry or to enter into a civil partnership, and wedding or civil partnership presents by third parties, see PARA 252.

3 *Re Breton's Estate, Breton v Woollven* (1881) 17 ChD 416 (letters handed by a husband to his wife ineffectual to give her furniture which continued to be used by them in common). In *Farington v Parker* (1867) LR 4 Eq 116, where chattels were held upon trust as a married woman should appoint, and in default of appointment to be at her sole and absolute disposal, it was held that she could dispose of them by delivery without any writing.

Where property is purchased by a spouse or civil partner for use in or adornment of their common establishment, with an intention on the part of the purchaser of making a gift of the item to the other spouse or civil partner, it may be extremely difficult to say whether, and when, a sufficient act of delivery has taken place. Where, however, the intended donee is the sole legal and beneficial owner of the property in which the chattels in question are located at the time of the alleged gift, a chattel purchased by the intending donor and delivered to the property has necessarily been transferred into the possession of the intended donee; and although that possession at that stage may be no more than as a bailee for the purchasing spouse or civil partner, that would be sufficient for the purposes of giving efficacy to antecedent, contemporary, or subsequent words of gift: see *Law Society v Southall* [2000] All ER (D) 2220 per Hart J (at paras 11-12) (revsd on other grounds [2001] EWCA Civ 2001, [2001] All ER (D) 208 (Dec)).

4 *Slanning v Style* (1734) 3 P Wms 334 at 337; *Milnes v Busk* (1794) 2 Ves 488; *M'Lean v Longlands* (1799) 5 Ves 71; *Rich v Cockell, Rich v Hull* (1804) 9 Ves 369; *Walter v Hodge* (1818) 2 Swan 92; *Mews v Mews* (1852) 15 Beav 529; *Hoyes v Kindersley* (1854) 2 Sm & G 195; *Re Flamank, Wood v Cock* (1889) 40 ChD 461. The

uncorroborated evidence of a claimant against the estate of a deceased person is always viewed with suspicion, but it will not necessarily be rejected: *Re Garnett, Gandy v Macaulay* (1885) 31 ChD 1, CA; and see *Re Whittaker, Whittaker v Whittaker* (1882) 21 ChD 657, where the court refused to admit the claim of a wife on her uncorroborated statement. Cf *Re Gonin* [1979] Ch 16, sub nom *Re Gonin, Gonin v Garmeson* [1977] 2 All ER 720.

5 *Bashall v Bashall* (1894) 11 TLR 152, CA; *Re Cole (a bankrupt), ex p Trustee of Property of Bankrupt v Cole* [1964] Ch 175, [1963] 3 All ER 433, CA; *Glaister-Carlisle v Glaister-Carlisle* (1968) 112 Sol Jo 215, CA. When a husband told his wife that he was giving her a car, and had her name put in the registration book, there was no equitable assignment to her of the benefit of the hire-purchase agreement under which the husband had acquired the car, or declaration of trust of it for her: *Spellman v Spellman* [1961] 2 All ER 498, [1961] 1 WLR 921, CA. Furthermore, as the husband was not the owner of the car, he could not make a gift of it to his wife: see PARA 201.

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## 206. Aliens.

An alien<sup>1</sup> can dispose of real and personal property of every description, except a British ship (of which he cannot be the owner<sup>2</sup>), in the same manner as can British subjects<sup>3</sup>.

1 A person who is neither a Commonwealth citizen nor a British protected person nor a citizen of the Republic of Ireland: see the British Nationality Act 1981 s 50(1); and **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13. As to Commonwealth citizens see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 11; and as to British protected persons see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 10, 72-76.

2 See PARA 218. As to the meaning of 'British ship' see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 230.

3 See **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13.

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## 207. Limited companies.

A limited company frequently takes power by its memorandum of association to benefit gratuitously the company's employees and their relatives, and to subscribe to charitable objects; a company's capacity to act is not, however, limited by its constitution<sup>1</sup> and, without express power, a company incorporated by special Act of Parliament or under the Companies Acts<sup>2</sup> can give gratuities<sup>3</sup> when to do so tends to the prosperity of the company's business. A company may not subscribe, however, without express power, towards objects which do not tend to benefit the company<sup>4</sup>, and a public body cannot forgo money owing to it where this would prejudice others to whom it has to account<sup>5</sup>. Furthermore, the power to give a gratuity does not extend in all circumstances to a company in liquidation, as the gratuities cannot in such a case tend to the prosperity of the company's business<sup>6</sup>; this rule is, however, substantially qualified by statute, under which the powers of a company include, if they would not otherwise do so, power to make, for the benefit of persons employed or formerly employed by the company or any of its subsidiaries, provision in connection with the cessation or the transfer to any person of the whole or part of the undertaking of the company or that subsidiary<sup>7</sup>.

It has been held where a company at its general meeting placed certain shares at the disposal of the directors that those shares were not given to the directors for their own benefit, but that the directors were to account for them to the company<sup>8</sup>.

1 See the Companies Act 2006 ss 39, 40; and **COMPANIES** vol 14 (2009) PARAS 263, 265.

2 As to the 'Companies Acts' see the Companies Act 2006 s 2; and **COMPANIES** vol 14 (2009) PARA 16. As to the control of gifts made in the form of donations to political parties, other political organisations and independent election candidates see Pt 14 (ss 362-379); and **COMPANIES** vol 14 (2009) PARA 688 et seq. As to a company's power to make gifts in favour of charity see eg *MBF (1954) Ltd v Nuffield Nursing Homes Trust* [2001] All ER (D) 244 (Jul). Certain gifts for political or charitable purposes must be disclosed in a company's annual directors' report under the Companies Act 2006 s 415: see the Small Companies and Groups (Accounts and Directors' Report) Regulations 2008, SI 2008/409, reg 7, Sch 5 paras 2-4; the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410, reg 10, Sch 7 paras 3-5; and **COMPANIES** vol 15 (2009) PARA 821.

3 Eg superannuation allowances for retiring employees: *Wimbledon and Putney Commons Conservators v Tuelly* [1931] 1 Ch 190.

4 *Tomkinson v South-Eastern Rly Co* (1887) 35 ChD 675 (company proposed to subscribe to the Imperial Institute); *Eastern Counties Rly Co v Hawkes* (1885) 5 HL Cas 331 at 348.

5 *Southampton Dock Co v Southampton Harbour and Pier Board* (1872) LR 14 Eq 595.

6 *Parke v Daily News Ltd* [1962] Ch 927, [1962] 2 All ER 929.

7 See the Companies Act 2006 s 247(1); and **COMPANIES** vol 14 (2009) PARA 546.

8 *York and North Midland Rly Co v Hudson* (1853) 16 Beav 485.

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## 208. Other corporations and local authorities.

Prima facie a corporation created by royal charter has power to deal with its property in the same manner as an ordinary person<sup>1</sup>, but a statutory corporation is the creature of, and derives its powers from, the statute creating it<sup>2</sup>.

The funds of a non-commercial statutory body are, in effect, trust funds, and so cannot be applied without statutory authority to the making of presents<sup>3</sup>. Local authorities, although not trustees for their ratepayers or council tax payers, owe an analogous fiduciary duty to their ratepayers and council tax payers in relation to the funds contributed by them, and in the absence of clear statutory authority are not entitled to make a gift or present in money's worth to a particular section of the local community at the expense of the general body of that community<sup>4</sup>.

1 However a member of the corporation may obtain an injunction to restrain the corporation from doing an act prohibited by the charter: *Jenkin v Pharmaceutical Society of Great Britain* [1921] 1 Ch 392.

2 *Sutton's Hospital Case* (1612) 10 Co Rep 1a at 23a, Ex Ch; *Baroness Wenlock v River Dee Co* (1883) 36 ChD 675n, CA, per Bowen LJ; affd (1885) 10 App Cas 354, HL.

3 See generally **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1101 et seq.

4 *Prescott v Birmingham Corpn* [1955] Ch 210 at 235, [1954] 3 All ER 698 at 706, CA. In the following cases, all decided before the abolition of the general rate by the Local Government Finance Act 1988, it was held that without statutory authority:

- 1 (1) free travel concessions could not be granted to a particular section of ratepayers at the expense of the rates by an authority operating a public transport undertaking (*Prescott v Birmingham Corpn* [1955] Ch 210, [1954] 3 All ER 698, CA, a decision which led to the creation of statutory powers to grant travel concessions under the Public Service Vehicles (Travel Concessions) Act 1955 (now the Transport Act 1985 s 93: see **ROAD TRAFFIC** vol 40(3) (2007 Reissue) PARA 1280));
- 2 (2) a gratuity could not be given out of the rates to an officer of a local authority (*Ex p Mellish* (1863) 8 LT 47);
- 3 (3) a borough council could not pay out of the rates for a chain and badge for the mayor (*A-G v Batley Corpn* (1872) 26 LT 392);
- 4 (4) where a borough council was lord of a manor, it could not charge the rates with the usual dinners and refreshment for the juries of the manor (*R v Bideford Corpn* (1883) 47 JP Jo 756);
- 5 (5) a municipal corporation could not endow the ministers of certain churches and chapels with fixed stipends (*A-G v Aspinall* (1837) 2 My & Cr 613);
- 6 (6) a vestry incorporated under the Metropolis Management Act 1855 (repealed) could not out of the rates or parish funds defray the expenses of the celebration of the opening of a new vestry hall nor of a dinner and ball in connection with it (*A-G v Bermondsey Vestry* (1883) 23 ChD 60, CA); and
- 7 (7) a municipal corporation could not subsidise a college in the town (*A-G v Cardiff Corpn* [1894] 2 Ch 337: local education authorities now have a statutory duty to secure the provision of facilities for further education: see **EDUCATION**).

A corporation might, however, make a reasonable addition to the mayor's salary if it seemed likely that during his year of office his expenditure as mayor on functions and so forth might be increased by reason of the occurrence of some event of national importance: *A-G v Cardiff Corpn* [1894] 2 Ch 337. In connection with local authorities see further PARA 219.

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## 209. Power of attorney.

A deed of gift may be executed under a power of attorney, provided the power is executed as a deed and authorises the gift: if the power did not authorise the gift, there can still be a redelivery, or what is equivalent to a redelivery, by the donor, which will validate the gift<sup>1</sup>.

<sup>1</sup> *Re Seymour, Fielding v Seymour* [1913] 1 Ch 475, CA; and see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 31, 34, 54.

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## 210. Lasting and enduring powers of attorney.



An attorney under a lasting power of attorney<sup>1</sup> is empowered to make decisions about all or any of the donor's personal welfare, property and affairs<sup>2</sup>: he is not, however, authorised to dispose of the donor's property by making gifts other than:

- 4 (1) on customary occasions<sup>3</sup> to persons (including himself) who are related to or connected with the donor<sup>4</sup>; or
- 5 (2) to any charity to whom the donor made or might have been expected to make gifts<sup>5</sup>,

provided that the value of any such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate<sup>6</sup>. The Court of Protection may authorise the making of gifts which are not authorised by these provisions<sup>7</sup>.

An attorney under an enduring power of attorney<sup>8</sup>, whether general or limited, may, without obtaining any consent, act under the power so as to benefit himself or other persons than the donor to the following extent but no further, that is to say:

- 6 (a) he may so act in relation to himself or in relation to any other person if the donor might be expected to provide for his or that person's needs respectively<sup>9</sup>; and
- 7 (b) he may do whatever the donor might be expected to do to meet those needs<sup>10</sup>.

In particular, an attorney under an enduring power, whether general or limited, may, without obtaining any consent, dispose of the property of the donor by way of gift to the following extent but no further, that is to say:

- 8 (i) he may make gifts of a seasonal nature or at a time, or on an anniversary, of a birth or marriage, to persons (including himself) who are related to or connected with the donor<sup>11</sup>; and
- 9 (ii) he may make gifts to any charity to whom the donor made or might be expected to make gifts<sup>12</sup>,

provided that the value of each such gift is not unreasonable having regard to all the circumstances and in particular the size of the donor's estate<sup>13</sup>.

The power to make limited gifts conferred by these provisions is subject to any conditions or restrictions in the instrument conferring the lasting power<sup>14</sup>. The power of the court<sup>15</sup> to give directions with respect to the management or disposal by an attorney under an enduring power of the property and affairs of the donor does not give the court unrestricted power to direct the attorney to dispose of any part of the property of the donor of the power, by way of gift or in recognition of some moral obligation unaccompanied by any legal obligation<sup>16</sup>.

1 Lasting powers of attorney and enduring powers of attorney are powers of attorney which are intended to survive the subsequent mental incapacity of the donor; since 1 October 2007 no more enduring powers may be created, but enduring powers existing on that date continue in force: see **AGENCY** vol 1 (2008) PARA 194.

2 See the Mental Capacity Act 2005 s 9(1); and **AGENCY** vol 1 (2008) PARA 217.

3 'Customary occasion' means the occasion or anniversary of a birth, a marriage or the formation of a civil partnership or any other occasion on which presents are customarily given within families or among friends or associates: see the Mental Capacity Act 2005 s 12(3); and **AGENCY** vol 1 (2008) PARA 217.

4 See the Mental Capacity Act 2005 s 12(2)(a); and **AGENCY** vol 1 (2008) PARA 217.

5 See the Mental Capacity Act 2005 s 12(2)(b); and **AGENCY** vol 1 (2008) PARA 217.

- 6 See the Mental Capacity Act 2005 s 12(2); and **AGENCY** vol 1 (2008) PARA 217.
- 7 See the Mental Capacity Act 2005 s 23(4); and **AGENCY** vol 1 (2008) PARA 235.
- 8 See note 1.
- 9 See the Mental Capacity Act 2005 Sch 4 para 3(2)(a); and **AGENCY** vol 1 (2008) PARA 195.
- 10 See the Mental Capacity Act 2005 Sch 4 para 3(2)(b); and **AGENCY** vol 1 (2008) PARA 195.
- 11 See the Mental Capacity Act 2005 Sch 4 para 3(3)(a); and **AGENCY** vol 1 (2008) PARA 195.
- 12 See the Mental Capacity Act 2005 Sch 4 para 3(3)(b); and **AGENCY** vol 1 (2008) PARA 195.
- 13 See the Mental Capacity Act 2005 Sch 4 para 3(3); and **AGENCY** vol 1 (2008) PARA 195.
- 14 See the Mental Capacity Act 2005 s 12(4), Sch 4 para 3(1)(b), (2), (3); and **AGENCY** vol 1 (2008) PARAS 195, 217.
- 15 See under the Mental Capacity Act 2005 Sch 4 para 16(2)(b)(i): see **AGENCY** vol 1 (2008) PARA 211. There is no exactly corresponding provision relating to lasting powers of attorney, although cf s 23(1), (2); and **AGENCY** vol 1 (2008) PARA 235.
- 16 *Re R (Enduring Power of Attorney)* [1990] Ch 647, [1990] 2 All ER 893.

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## (ii) Persons Not of Full Age and Capacity

### 211. Minors.

Gifts, whether of realty or personalty, made by minors<sup>1</sup> are voidable by them<sup>2</sup>, for it is one of the essentials of a valid gift that there should be the complete assent of the donor to the transfer of the property given, and a minor is incapable of giving such assent<sup>3</sup>. Thus, a deed executed by a minor which takes effect by delivery is voidable by him but not void<sup>4</sup>; but during minority the avoidance is as voidable as the disposition itself; the avoidance is final only if made on the minor's reaching full age, when he may affirm the disposition<sup>5</sup>. If a minor gives goods or money, the gift is voidable by him and may be recovered<sup>6</sup>.

1 As to the meaning of 'minors' see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 3.

2 See **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 46.

3 The dictum of Lord Mansfield CJ in *Earl of Buckinghamshire v Drury* (1762) 2 Eden 60 at 72, HL, that 'if an infant pays money with his own hand without a valuable consideration, he cannot get it back' has not been followed. In *Taylor v Johnston* (1882) 19 ChD 603, Bacon V-C appears to have held that a gift by a minor of chattels or personal property in his possession, unless made under duress or undue influence, could not be avoided by him, but it is submitted that this decision, being contrary to the law established by the above authorities, cannot be supported. See **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 46.

4 *Zouch d Abbot and Hallet v Parsons* (1765) 3 Burr 1794; *Allen v Allen* (1842) 2 Dr & War 307. A minor cannot convey the legal estate in land, as it is no longer vested in him: see the Law of Property Act 1925 s 1(6); the Settled Land Act 1925 s 26; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 30, 33, 56.

5 See *Paget v Paget* (1882) 11 LR Ir 26 at 28, CA, per Law LC; *Burnaby v Equitable Reversionary Interest Society* (1885) 28 ChD 416 at 424 per Pearson J; *Slator v Trimble* (1861) 14 ICLR 342; and see generally **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 30 et seq.

6 *Manby v Scott* (1663) 1 Mod Rep 124 at 137, Ex Ch.

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## 212. Mentally disordered persons.

A gift by a person incapable, by reason of mental disorder<sup>1</sup>, of managing and administering his property and affairs, so that the management of his property had been committed to the Court of Protection<sup>2</sup> (such a person being referred to as a 'patient'<sup>3</sup>), would not be a valid gift. In the case of a mentally disordered person who is not a patient of the Court of Protection, the degree or extent of understanding required is relative to the circumstances of the particular transaction: thus, at one extreme, if the subject matter and value of a gift are trivial in relation to the donor's other assets, a low degree of understanding will suffice; but, at the other, if its effect is to dispose of the donor's only asset of value and thus for practical purposes to pre-empt the devolution of his estate under his will or on his intestacy, then the degree of understanding required is as high as that required for a will<sup>4</sup>, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of<sup>5</sup>.

The powers of the Court of Protection to make a decision on a patient's behalf in relation to a matter or matters concerning the patient's property or affairs<sup>6</sup>, or to appoint a deputy to make decisions on the patient's behalf in relation to such a matter or matters<sup>7</sup>, extends to the gift or other disposition of the patient's property<sup>8</sup>.

1 'Mental disorder' means any disorder or disability of mind, and 'mentally disordered' is construed accordingly: see the Mental Health Act 1983 s 1(2); and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 402. It was formerly the law that gifts inter vivos by 'idiots and lunatics so found', whether of realty or personalty, were absolutely void (*Bac Abr, Idiots and Lunatics* (F); *Beverley's Case* (1603) 4 Co Rep 123b at 126b; *Elliot v Ince* (1857) 7 De GM & G 475) even though made during a lucid interval (*Re Walker* [1905] 1 Ch 160, CA) although a gift by will in similar circumstances was valid. The reason was that a gift by deed, if valid, would have given the donees a claim adverse to the Crown's right to the control of the property: *Re Walker* at 172. The terms 'idiot' and 'lunatic so found' are now obsolete, and persons who would formerly have been classed as such are now included among those suffering from 'mental disorder', which embraces disorders of the mind less acute than those exhibited by a person who would have come within the former terms.

2 As to the Court of Protection see the Mental Capacity Act 2005 Pt II (ss 45-61); and **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 750-764.

3 'Patient' here means a person suffering or appearing to be suffering from mental disorder: see the Mental Health Act 1983 s 145(1); the Mental Capacity Act 2005 s 28(2); **MENTAL HEALTH** vol 30(2) (Reissue) PARA 435; and see *Re S (FG) (Mental Health Patient)* [1973] 1 All ER 273, [1973] 1 WLR 178.

4 This includes an understanding of the claims of all potential beneficiaries and the extent of the property to be disposed of: see further **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 308 et seq; **WILLS** vol 50 (2005 Reissue) PARA 324 et seq.

5 *Re Beaney* [1978] 2 All ER 595, [1978] 1 WLR 770; applied in *Pesticcio v Huet* [2003] 2 P & CR D22, [2003] All ER (D) 237 (Apr); affd [2004] EWCA Civ 372, 148 Sol Jo LB 420, [2004] All ER (D) 36 (Apr) (where, however, it was found that although the claimant had had the necessary capacity to execute the deed of gift, he had done so under the undue influence of the third defendant). Cf *Williams v Williams* [2003] EWHC 742 (Ch), [2003] All ER (D) 403 (Feb). See also *Re Morris, Special Trustees for Great Ormond Street Hospital for Children v Rushin* [2000] All ER (D) 598 (deceased had been suffering from material degree of dementia caused by Alzheimer's disease at the time of making inter vivos gifts to her carers).

6 Ie the power conferred by the Mental Capacity Act 2005 s 16(1)(b), (2)(a): see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 757.

7 Ie under the Mental Capacity Act 2005 s 16(1)(b), (2)(b): see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 757.

8 See the Mental Capacity Act 2005 s 18(1)(b); and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 759. See also *Re S (gifts by mental patient)* [1997] 2 FCR 320, [1997] 1 FLR 96 (a decision under corresponding provisions of the Mental Health Act 1983 (repealed)) and *R v Mazo* [1997] 2 Cr App Rep 518, [1996] Crim LR 435, CA (a decision under the Theft Act 1968 s 1(1)). Under a former law a similar jurisdiction has been exercised not only so as to allow gifts to charitable institutions which the patient when sane had supported, but also so as to complete a gift in discharge of what the donor, when sane, had regarded as a moral obligation: see *Re Whitaker* (1889) 42 ChD 119, CA. As to the possible moral obligation of a wealthy person to give to charity see PARA 214 note 3.

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### **213. Other persons suffering from incapacity.**

A gift by a person in such a state of intoxication as to be non compos mentis is void, but a gift by a drunkard not in that extreme state of intoxication may be set aside only if unfair advantage of his drunken state was taken by the donee<sup>1</sup>.

Property which belongs to a bankrupt at the commencement of bankruptcy vests in the trustee on his appointment's taking effect or in the official receiver on his becoming trustee<sup>2</sup>, and accordingly cannot be the subject of a gift by the bankrupt. In respect of after-acquired property, the bankrupt must give notice to the trustee within 21 days of becoming aware of the relevant facts and must not dispose of the property within 42 days of the notice without the trustee's consent in writing<sup>3</sup>. The trustee may claim such after-acquired property for the bankrupt's estate by notice in writing<sup>4</sup>.

1 *Cory v Cory* (1747) 1 Ves Sen 19; *Cooke v Clayworth* (1811) 18 Ves 12 at 16; *Butler v Mulvihill* (1819) 1 Bli 137, HL; *Nagle v Baylor* (1842) 3 Dr & War 60; and cf **CONTRACT** vol 9(1) (Reissue) PARA 717.

2 See the Insolvency Act 1986 s 306(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 391. Further, any disposition by the bankrupt in the period between presentation of the bankruptcy petition and the vesting of the estate in the trustee is void unless it is made with the consent of the court or is subsequently ratified by the court: see s 284(1), (3); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 217. As to benefits under an annuity contract or a pension scheme containing a restriction against alienation see *Krasner v Dennison* [2001] Ch 76, [2000] 3 All ER 234, CA.

3 See the Insolvency Act 1986 s 333(2); the Insolvency Rules 1986, SI 1986/1925, r 6.200(1), (2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 447-448.

4 See the Insolvency Act 1986 s 307(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 445.

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### **(iii) Persons in Fiduciary Positions**

#### **214. Trustees, etc.**

Trustees and other persons in a fiduciary position cannot, unless they are authorised to do so, make gifts out of the property which they merely hold for others<sup>1</sup>. If they deem it desirable to make voluntary payments, such as subscriptions to local charities, they should apply to the

court for directions<sup>2</sup>. The court generally allows the expenditure of an annual sum on local charities for the sake of the reputation of the family and estate<sup>3</sup>.

1 See eg *Prescott v Birmingham Corp* [1955] Ch 210 at 235, [1954] 3 All ER 698 at 706, CA; and PARA 208.

2 In *How v Earl Winterton* (1902) 51 WR 262 the court allowed a trustee in his account the amount of a voluntary school rate on the ground that if no one paid the voluntary rate a board school would be established, and that would cause a heavier rate to be levied compulsorily. As to trustees' duties generally see **TRUSTS** vol 48 (2007 Reissue) PARA 947 et seq.

3 *Re Walker, Walker v Duncombe* [1901] 1 Ch 879 at 887. A wealthy beneficiary may regard himself as having a moral obligation to give to charity, and a power to apply trust property for the benefit of such a beneficiary may be exercised to enable him to discharge such an obligation: *Re Clore's Settlement Trusts, Sainer v Clore* [1966] 2 All ER 272, [1966] 1 WLR 955.

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### **215. Tenants for life, etc.**

For the benefit of the settled land, tenants for life and persons having their powers can grant water rights to statutory authorities<sup>1</sup>, make grants for public and charitable purposes<sup>2</sup> and dedicate land for streets and open spaces<sup>3</sup>. Trustees of land<sup>4</sup> and personal representatives, for the purposes of administration, or during the minority<sup>5</sup> of any beneficiary, or during any life estate, or until the period of distribution<sup>6</sup>, have similar powers.

1 See the Settled Land Act 1925 s 54; and **SETTLEMENTS** vol 42 (Reissue) PARA 868. Strict settlements can be created under the Settled Land Act 1925 only in a very limited class of cases: see **SETTLEMENTS** vol 42 (Reissue) PARA 675.

2 See the Settled Land Act 1925 s 55; **CHARITIES** vol 8 (2010) PARA 69; **SETTLEMENTS** vol 42 (Reissue) PARA 864. Gifts may be given to the National Trust by tenants for life and persons having their powers: see the National Trust Act 1939 ss 3-9; and **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 993. As to the power of limited owners to give gifts for places of worship see the Places of Worship Sites Act 1873; the Places of Worship Sites Amendment Act 1882; and **ECCLESIASTICAL LAW** vol 14 PARA 1065.

3 See the Settled Land Act 1925 s 56; and **SETTLEMENTS** vol 42 (Reissue) PARA 865. Similar powers are contained in the Universities and College Estates Act 1925 ss 14-16 (see **EDUCATION** vol 15(2) (2006 Reissue) PARA 1379) and the Crown Estate Act 1961 s 4 (see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 294).

4 For the purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner: see the Trusts of Land and Appointment of Trustees Act 1996 s 6(1); and **TRUSTS** vol 48 (2007 Reissue) PARA 1035.

5 See PARA 211 note 1.

6 See the Administration of Estates Act 1925 s 39(1); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 440.

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### **(iv) Deceased Donors**

#### **216. Proof of gifts by deceased persons.**

A gift alleged to have been made by a deceased person cannot, as a general rule, be established without some corroboration<sup>1</sup>. In some cases the judges have definitely stated that the court cannot act on the unsupported testimony of a person in his own favour, but there is now no hard and fast rule that the evidence of the alleged donee must be disbelieved if uncorroborated. It must be examined with scrupulous care, even with suspicion, but if it brings conviction to the tribunal which has to try the case that conviction will be acted on<sup>2</sup>.

1 *Consett v Bell* (1842) 1 Y & C Ch Cas 569; *Custance v Cunningham* (1851) 13 Beav 363; *Grant v Grant* (1865) 34 Beav 623; *Down v Ellis* (1865) 35 Beav 578; *Hartford v Power* (1868) IR 3 Eq 602; *Hughes v Seanor* (1869) 18 WR 108; *Rogers v Powell* (1869) 18 WR 282; *Morley v Finney* (1870) 18 WR 490 (where James V-C stated as a reason for the rule that 'the temptation to lie is so strong, and the facility with which a lie may be concocted is so great'); *Hill v Wilson* (1873) 8 Ch App 888, LJJ; *Re Whittaker, Whittaker v Whittaker* (1882) 21 ChD 657; *Re Finch, Finch v Finch* (1883) 23 ChD 267, CA; *Re Harnett, Leahy v O'Grady* (1886) 17 LR Ir 543; *Vavas seur v Vavas seur* (1909) 25 TLR 250; *Re Craig, Meneces v Middleton* [1971] Ch 95, [1970] 2 All ER 390. See also **EQUITY** vol 16(2) (Reissue) PARA 417 et seq. As to corroboration see PARA 217.

2 *Re Garnett, Gandy v Macaulay* (1885) 31 ChD 1, CA; *Re Richardson, Shillito v Hobson* (1885) 30 ChD 396, CA; *Re Hodgson, Beckett v Ramsdale* (1885) 31 ChD 177, CA; *Rawlinson v Scholes* (1898) 79 LT 350; *Re Farman, Farman v Smith* (1887) 57 LJCh 637; *Re Dillon, Duffin v Duffin* (1890) 44 ChD 76, CA; *Re Griffin, Griffin v Griffin* [1899] 1 Ch 408; *Minister of Stamps v Townend* [1909] AC 633, PC; *Re Pink, Pink v Pink* [1912] 2 Ch 528 at 533, CA; *Re Goff, Featherstonehaugh v Murphy* (1914) 111 LT 34; *Re Richards, Jones v Rebbeck* [1921] 1 Ch 513 at 519 (gift mortis causa); *Thomas v Times Book Co Ltd* [1966] 2 All ER 241, [1966] 1 WLR 911; *Re Tyler's Fund Trusts, Graves v King* [1967] 3 All ER 389 at 392, [1967] 1 WLR 1269 at 1275-1276; *Re Cummins, Cummins v Thompson* [1972] Ch 62, [1971] 3 All ER 782, CA. See also *Re Gonin* [1979] Ch 16, sub nom *Re Gonin, Gonin v Garmeson* [1977] 2 All ER 720.

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## 217. Corroboration.

Corroboration is some testimony supporting a material point in the testimony to be corroborated<sup>1</sup>. It may be supplied by the evidence of some other person, by some attendant circumstances or by some facts established from another source<sup>2</sup>. Thus it has been held that the mere fact that the subject of the alleged gift was kept in a house belonging to the wife, if that was the home or one of the homes of the husband, would not be regarded as corroborative of the wife's allegation of a gift<sup>3</sup>. On the other hand, proof that the alleged donor was at the time making gifts to other members of the family has been held to be corroborative of the claimant's story<sup>4</sup>.

1 *Re Finch, Finch v Finch* (1883) 23 ChD 267 at 272, CA, per Sir George Jessel MR. As to corroboration in criminal proceedings see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1449-1454; as to corroboration in civil proceedings see **CIVIL PROCEDURE** vol 11 (2009) PARAS 1053-1054.

2 *Down v Ellis* (1865) 35 Beav 578 at 581 per Lord Romilly MR.

3 *Re Finch, Finch v Finch* (1883) 23 ChD 267, CA.

4 *Re Richardson, Shillito v Hobson* (1885) 30 ChD 396 at 400, CA, per Lord Esher MR.

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### (3) DONEES

#### 218. Competency of donees.

In general all persons, whether of full age and capacity or not, are competent to receive gifts; but there are certain exceptions<sup>1</sup>.

Minors<sup>2</sup> are capable of receiving property, other than a legal estate in land<sup>3</sup>, but they may avoid the gift on attaining majority<sup>4</sup>. Where property is given to a minor, it vests in him immediately upon the gift's being completed<sup>5</sup>, and a gift inter vivos to a minor cannot afterwards be revoked<sup>6</sup>. A gift of a legal estate in land will vest in him the equitable estate only<sup>7</sup>. A minor cannot give a good discharge for money paid to him in pursuance of an instrument, unless thereby expressly authorised to do so<sup>8</sup>, except that a married minor or a child who has formed a civil partnership can give a receipt for income, including accumulations of income made during his or her minority<sup>9</sup>. It continues to be provided by statute that a married woman is capable of acquiring and holding any real or personal property as her separate property as if she were single<sup>10</sup>.

References in any instrument, however expressed, to any relationship between two persons must be construed, unless the contrary intention appears, without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time<sup>11</sup>.

An alien<sup>12</sup> can receive a gift of property, except a British ship<sup>13</sup> or a share in it<sup>14</sup>. Gifts may be made and received for the benefit of the public, a familiar instance of which is a gift for the purposes of a highway or footway, which is constituted by dedication and acceptance by the public<sup>15</sup>.

It has been held that a vicar, in relation to the freehold of the church along with its fixtures, and churchwardens, in relation to the property in plate, ornaments and other movable goods of the church, are owners and not trustees or custodians of gifts given to their church; however, the disposal of such gifts is at the discretion of the consistory court which can impose terms on any disposal it allows<sup>16</sup>.

1 See the text and notes 2-16; and **PARAS 219-220**.

2 As to minority see **PARA 211** note 1.

3 See the Law of Property Act 1925 s 1(6); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) **PARA 30**.

4 See *Bac Abr, Infancy and Age* (l) 3; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) **PARAS 39, 41, 43**. In *Haynes's Case* (1614) 12 Co Rep 113, it is stated that 'if apparel be put up on a boy, this is a gift in the law, for the boy hath capacity to take it'.

5 *Hunter v Westbrook* (1827) 2 C & P 578.

6 *Smith v Smith* (1836) 7 C & P 401.

7 See the Law of Property Act 1925 s 1(6); **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) **PARA 30**; **REAL PROPERTY** vol 39(2) (Reissue) **PARA 54**. A purported conveyance of land to a minor or two or more minors, whether alone or with another person or persons of full age, will not operate to create a trust of land: see the Trusts of Land and Appointment of Trustees Act 1996 s 2, Sch 1 para 1(1), (2); **SALE OF LAND** vol 42 (Reissue) **PARA 71**; **SETTLEMENTS** vol 42 (Reissue) **PARA 677**.

8 *Re Denekin, Peters v Tanchereau* (1895) 72 LT 220. A minor can exercise a power, even though it be coupled with an interest, where an intention appears that it should be exercisable during minority: see *Re Cardross's Settlement* (1878) 7 ChD 728.

9 See the Law of Property Act 1925 s 21; the Administration of Estates Act 1925 s 47(1)(ii); **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 12; **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 605.

10 See the Law Reform (Married Women and Tortfeasors) Act 1935 s 1(a); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 204 (noting that no corresponding provision is made in relation to civil partners). As to the giving of gifts between spouses and civil partners, and the particular statutory provision conferring competency on a married woman to receive gifts from her husband, see the Law of Property Act 1925 s 37; and PARA 205. As to the legal incidents of marriage and civil partnership generally see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 203 et seq.

11 See the Family Law Reform Act 1987 s 1(1); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 125. This has been the position since 4 April 1988 (ie the date on which s 1(1) was brought into force by the Family Law Reform Act 1987 (Commencement No 1) Order 1988, SI 1988/425). Formerly provision in this regard was made by the Family Law Reform Act 1969 s 15(1) (repealed), which provided that references to children and other relatives generally in dispositions made on or after 1 January 1970 included reference to, and to persons related through, illegitimate children, and the Legitimacy Act 1976 s 5 (replacing the Children Act 1975 Sch 1 para 12 (repealed)), which continues to provide that, with effect from 1 January 1976, a legitimated person, and any other person, is, in the case of an instrument other than an instrument existing on that date, entitled to take any interest disposed of by it as if the legitimated person had been legitimate (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 478). See also **SETTLEMENTS** vol 42 (Reissue) PARAS 731-732; **WILLS** vol 50 (2005 Reissue) PARA 645.

12 As to the meaning of 'alien' see PARA 206 note 1.

13 As to the meaning of 'British ship' see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 230.

14 See **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13.

15 See *A-G v Esher Linoleum Co Ltd* [1901] 2 Ch 647; and see generally, as to dedication and acceptance, **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 108 et seq. As to gifts to local authorities see PARA 219.

16 See *Re St Anne's, Wrenthorpe* [1994] Fam 83, [1994] 2 WLR 338, Consist Ct. As to gifts for church purposes see further **ECCLESIASTICAL LAW** vol 14 PARA 1057.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(3) DONEES/219. Local authorities.

## 219. Local authorities.

For the purpose of discharging any of its functions a local authority<sup>1</sup> may accept, hold and administer gifts of property, whether real or personal, made for that purpose, or for the benefit of the inhabitants of its area or of some part of it<sup>2</sup>. This power does not, however, authorise the acceptance by a local authority of property which, when accepted, would be held in trust for an ecclesiastical charity or for a charity for the relief of poverty<sup>3</sup>. A local education authority has an express power to accept, hold and administer any property on trust for the purposes of education<sup>4</sup>. District councils and national park authorities are expressly authorised to acquire by way of gift any estate in or rights over a common regulated by a scheme<sup>5</sup>.

1 I.e. a county council, a district council, a London borough council or a parish council or, in relation to Wales, a county council, county borough council or community council: see the Local Government Act 1972 s 270(1); and **LOCAL GOVERNMENT** vol 69 (2009) PARA 23. As to the English counties and districts and their councils see **LOCAL GOVERNMENT** vol 69 (2009) PARA 24 et seq. As to county and county borough councils in Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 41 et seq. As to parishes generally see **LOCAL GOVERNMENT** vol 69 (2009) PARA 27 et seq and as to communities generally see **LOCAL GOVERNMENT** vol 69 (2009) PARA 41 et seq. As to administrative areas and authorities in London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 29 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARAS 51-55.

2 See the Local Government Act 1972 s 139(1); and **LOCAL GOVERNMENT** vol 69 (2009) PARA 528.



3 See the Local Government Act 1972 s 139(3); and **LOCAL GOVERNMENT** vol 69 (2009) PARA 528. All charities directed to the relief of individual distress, whether due to poverty, age, sickness or other similar individual afflictions, are eleemosynary: *Re Armitage, Ellam v Norwich Corpn* [1972] Ch 438, sub nom *Re Armitage's Will Trusts, Ellam v City and County of Norwich* [1972] 1 All ER 708.

4 See the Education Act 1996 s 529(1); and **EDUCATION** vol 15(2) (2006 Reissue) PARA 1432.

5 See the Commons Act 1899 s 7; the Environment Act 1995 s 70, Sch 9 para 1(3); **COMMONS** vol 13 (2009) PARA 596; **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 642. As to national park authorities generally see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 526.

## UPDATE

### 219 Local authorities

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(3) DONEES/220. Persons not competent to receive gifts.

### 220. Persons not competent to receive gifts.

A gift to a trustee by his beneficiary out of the trust property is liable to be set aside<sup>1</sup>, and a gift by a beneficiary to an executor is regarded with great suspicion<sup>2</sup>.

An officer or servant of a friendly or industrial and provident society cannot be the nominee of a member under the provisions of the Acts authorising nominations, unless he or she is the nominator's spouse, civil partner, father, mother, child, brother, sister, nephew or niece<sup>3</sup>.

It is a breach of duty for an agent to receive a secret gift from a third person with whom his principal is dealing<sup>4</sup>, and as a general rule an agent may not retain as against his principal a gift from a third person in connection with his principal's affairs without the principal's knowledge<sup>5</sup>. An agent who corruptly accepts any gift for doing or forbearing to do acts in relation to his principal's affairs or business is guilty of an offence, and the donor of the gift is equally guilty<sup>6</sup>.

A person dead at the date of the execution of a deed cannot take under it, so that his personal representatives cannot claim a transfer of the property comprised in such deed to them<sup>7</sup>, but a person named in a deed and intended to take under it is presumed to have been alive at the date of its execution until the contrary is proved<sup>8</sup>.

A corpse cannot receive a gift, so that a shroud or winding sheet remains the property of the person who owned it when the dead body was wrapped in it<sup>9</sup>.

1 See **EQUITY** vol 16(2) (Reissue) PARA 426; **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 323; **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 839 et seq; **TRUSTS** vol 48 (2007 Reissue) PARA 944.

2 *Wheeler v Sargeant* (1893) 69 LT 181.

3 See the Friendly Societies Act 1974 s 66(1), (5); the Industrial and Provident Societies Act 1965 s 23(1), (2); PARA 236; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 2230, 2234, 2503, 2504.

4 *Re Canadian Oil Works Corpn, Hay's Case* (1875) 10 Ch App 593.

5 See **AGENCY** vol 1 (2008) PARAS 76, 91.

6 See the Prevention of Corruption Act 1906 s 1; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 321.

7 *Re Tilt, Lampet v Kennedy* (1896) 74 LT 163.

8 *Re Corbishley's Trusts* (1880) 14 ChD 846; and see **CIVIL PROCEDURE** vol 11 (2009) PARA 1101.

9 *Haynes's Case* (1614) 12 Co Rep 113.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(3) DONEES/221. Gifts for non-charitable purposes, etc.

## 221. Gifts for non-charitable purposes, etc.

There are three grounds which may invalidate gifts for non-charitable purposes, non-charitable institutions or societies, and non-human beneficiaries such as an animal or a tomb<sup>1</sup>. First, it is a fundamental rule that the objects of a trust must be certain, and accordingly gifts for philanthropic<sup>2</sup>, patriotic<sup>3</sup>, public<sup>4</sup> or benevolent<sup>5</sup> purposes are all void, for these words have no technical legal meaning<sup>6</sup>. A gift for charitable purposes, however, is valid, for charity is a word with a technical legal meaning<sup>7</sup>. Secondly, what is sometimes called the 'beneficiary principle' lays down that a gift can be made to persons (including a corporation) but cannot be made to a purpose or to an object; so, also a trust may be created for the benefit of persons as beneficiaries, but not for a purpose or object unless the purpose or object be charitable<sup>8</sup>. Thirdly, a non-charitable gift may be invalid as infringing the rule against perpetuities<sup>9</sup>.

The beneficiary principle does not invalidate a gift which, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals<sup>10</sup>. In the case of gifts to unincorporated non-charitable associations the first task is to construe the gift. If it is construed as a gift to the trustees or other proper officers of the association on trust to carry into effect the purposes of the association it will fail by reason of the beneficiary principle. It will be valid if it is construed as a gift to the individual members of the association at the date of the gift for their own benefit<sup>11</sup>, and, since the Perpetuities and Accumulations Act 1964, even if future members for ever or for an indefinite period are included<sup>12</sup>. It will also be valid if, as is commonly the case, it is construed as a gift to the existing members beneficially, but on the basis that the subject matter of the gift is given as an accretion to the funds of the association and falls to be dealt with in accordance with the rules of the association by which the members are contractually bound between themselves<sup>13</sup>.

1 Such gifts can only be valid, if at all, by way of trust, because purposes, unincorporated associations and non-human beneficiaries do not have the legal personality to take directly as donees.

2 *Re Macduff, Macduff v Macduff* [1896] 2 Ch 451, CA.

3 *A-G v National Provincial and Union Bank of England* [1924] AC 262, HL.

4 *Houston v Burns* [1918] AC 337, HL.

5 *Chichester Diocesan Fund and Board of Finance Inc v Simpson* [1944] AC 341, [1944] 2 All ER 60, HL.

6 Also void for uncertainty are 'trusts for the formation of an informed international public opinion' and 'the promotion of greater co-operation in Europe and the West in general' (*Re Koeppler Will Trusts, Barclays Bank Trust Co Ltd v Slack* [1984] Ch 243, [1984] 2 All ER 111; revsd [1986] Ch 423, [1985] 2 All ER 869, CA, but approved on this point); and a trust to apply the subject matter for such purposes as the donee may think fit (*Re Pugh's Will Trusts, Marten v Pugh* [1967] 3 All ER 337, [1967] 1 WLR 1262).

7 See **CHARITIES** vol 8 (2010) PARAS 1-2.

8 *Morice v Bishop of Durham* (1805) 10 Ves 522; affg (1804) 9 Ves 399 at 405; *Bowman v Secular Society Ltd* [1917] AC 406, HL; *Re Wood, Barton v Chilcott* [1949] Ch 498, [1949] 1 All ER 1100; *Re Astor's Settlement Trusts, Astor v Scholfield* [1952] Ch 534, [1952] 1 All ER 1067; *Re Shaw, Public Trustee v Day* [1957] 1 All ER 745, [1957] 1 WLR 729; compromised [1958] 1 All ER 245n, CA; *Leahy v A-G for New South Wales* [1959] AC 457, [1959] 2 All ER 300, PC; *Re Endacott, Corpe v Endacott* [1960] Ch 232, [1959] 3 All ER 562, CA; *Re Recher's Will Trusts, National Westminster Bank Ltd v National Anti-Vivisection Society Ltd* [1972] Ch 526, [1971] 3 All ER 401. But see *Re Harpur's Will Trusts, Haller v A-G* [1962] Ch 78 at 91, [1961] 3 All ER 588 at 592, CA, per Lord Evershed MR. Cf *R v District Auditor, ex p West Yorkshire Metropolitan County Council* [1986] RVR 24, DC.

9 See **PERPETUITIES AND ACCUMULATIONS** vol 35 (Reissue) PARA 1005.

10 *Re Denley's Trust Deed, Holman v HH Martyn & Co Ltd* [1969] 1 Ch 373, [1968] 3 All ER 65; *Re Lipinski's Will Trusts, Gosschalk v Levy* [1976] Ch 235, [1977] 1 All ER 33; *Re Grant's Will Trusts, Harris v Anderson* [1979] 3 All ER 359, [1980] 1 WLR 360. On a true analysis of the facts of a particular case it may be that there is no trust and the matter is one of contract: see *Conservative and Unionist Central Office v Burrell (Inspector of Taxes)* [1982] 2 All ER 1, [1982] 1 WLR 522, CA. There are anomalous exceptions to the beneficiary principle in relation to gifts in wills for the benefit of specific animals or tombs: *Pettingall v Pettingall* (1842) 11 LJCh 176; *Mitford v Reynolds* (1848) 16 Sim 105; *Trimmer v Danby* (1856) 25 LJCh 424; *Hoare v Osborne* (1866) LR 1 Eq 585; *Mussett v Bingle* [1876] WN 170; *Re Vaughan, Vaughan v Thomas* (1886) 33 ChD 187; *Re Dean, Cooper-Dean v Stevens* (1889) 41 ChD 552; *Pirbright v Salway* [1896] WN 86; *Re Manser, A-G v Lucas* [1905] 1 Ch 68; *Re King, Kerr v Bradley* [1923] 1 Ch 243; *Re Hooper, Parker v Ward* [1932] 1 Ch 38; *Re Thompson, Public Trustee v Lloyd* [1934] Ch 342; *Re Eighmie, Colbourne v Wilks* [1935] Ch 524; *Re Haines, Johnson v Haines* (1952) Times, 7 November; *Re Elliot, Lloyds Bank Ltd v Burton-on-Trent Hospital Management Committee* [1952] Ch 217, [1952] 1 All ER 145; *Re Astor's Settlement Trusts, Astor v Scholfield* [1952] Ch 534, [1952] 1 All ER 1067; *Re Endacott, Corpe v Endacott* [1960] Ch 232, [1959] 3 All ER 562, CA.

11 See *Re Clarke, Clarke v Clarke* [1901] 2 Ch 110; *Bowman v Secular Society Ltd* [1917] AC 406, HL; *Re Ogden, Brydon v Samuel* [1933] Ch 678; *Leahy v A-G for New South Wales* [1959] AC 457, [1959] 2 All ER 300, PC; *Neville Estates Ltd v Madden* [1962] Ch 832, [1961] 3 All ER 769; *Re Recher's Will Trusts, National Westminster Bank Ltd v National Anti-Vivisection Society Ltd* [1972] Ch 526, [1971] 3 All ER 401. Cf *Re Drummond, Ashworth v Drummond* [1914] 2 Ch 90.

12 In such case it will operate in favour of those members ascertained within the perpetuity period: see the Perpetuities and Accumulations Act 1964 ss 3(1), (4), 4(4); and **PERPETUITIES AND ACCUMULATIONS** vol 35 (Reissue) PARA 1005. But see *Re Recher's Will Trusts, National Westminster Bank Ltd v National Anti-Vivisection Society Ltd* [1972] Ch 526, [1971] 3 All ER 401 and *Re Grant's Will Trusts, Harris v Anderson* [1979] 3 All ER 359, [1980] 1 WLR 360, in neither of which cases was the effect of the 1964 Act considered.

13 *Re Recher's Will Trusts, National Westminster Bank Ltd v National Anti-Vivisection Society Ltd* [1972] Ch 526, [1971] 3 All ER 401; *Re Lipinski's Will Trusts, Gosschalk v Levy* [1976] Ch 235, [1977] 1 All ER 33. See also *Re Denley's Trust Deed, Holman v HH Martyn & Co Ltd* [1969] 1 Ch 373, [1968] 3 All ER 65; *Re Grant's Will Trusts, Harris v Anderson* [1979] 3 All ER 359, [1980] 1 WLR 360; *Universe Tankships Inc of Monrovia v International Transport Workers' Federation* [1983] 1 AC 366, [1982] 2 All ER 67, HL; *News Group Newspapers Ltd v Society of Graphical and Allied Trades* 1982 [1986] ICR 716, [1986] IRLR 227, CA; and see *Re Drummond, Ashworth v Drummond* [1914] 2 Ch 90; *Re Macaulay's Estate, Macaulay v O'Donnell* [1943] Ch 435n, HL; *Re Price, Midland Bank Executor and Trustee Co Ltd v Harwood* [1943] Ch 422, [1943] 2 All ER 505.

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## (4) SUBJECTS OF GIFTS

### (i) In general

#### 222. Property which may be subject of a gift.

As a general rule all property, real and personal, corporeal and incorporeal, may be the subject of gift; but some kinds of property are inalienable by their nature, for example titles of honour or dignities<sup>1</sup>, or may be made inalienable by Act of Parliament<sup>2</sup>.

In several cases in which real estate has been granted to persons for distinguished services performed and to support dignities then created, the legislature has attached conditions preventing or affecting the alienation of the fee simple<sup>3</sup>. In such cases alienation of the rents and profits during the life of the holder of the dignity is not prohibited<sup>4</sup>. Hereditaments the reversion to which is in the Crown, if given by the Crown by way of reward for services, are inalienable<sup>5</sup>, although if given out of affection they may be alienated as if given out of affection by a private person<sup>6</sup>.

1 See eg *Re Rivett-Carnac's Will* (1885) 30 ChD 136; the Law of Property Act 1925 s 201(2); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 335, 347.

2 See eg the National Trust Act 1907 s 21, Sch 1 Pt I; and **NATIONAL CULTURAL HERITAGE** vol 77 (2010) PARA 991.

3 See eg the cases of the Duke of Marlborough (6 Anne c 6) (1706-7) s 5; the Duke of Wellington (54 Geo 3 c 161) (1814) s 8; and see the Wellington Museum Act 1947; the Earl of Shrewsbury's Private Act 1719; *Earl of Shrewsbury v Scott* (1859) 6 CBNS 1; affd (1860) 6 CBNS 221, Ex Ch; *Howard v Earl of Shrewsbury* (1867) 2 Ch App 760; the Earl of Abergavenny Private Act 1555 (unprinted); *Earl of Abergavenny v Brace* (1872) LR 7 Exch 145; and 27 Hen 8 c xvi (1535); *Re Bolton Estates, Russell v Meyrick* [1903] 2 Ch 461, CA.

4 *Davis v Duke of Marlborough* (1818) 1 Swan 74.

5 See the Fines and Recoveries Act 1833 s 18; *Perkins v Sewell* (1768) 1 Wm Bl 654 at 659; **PERPETUITIES AND ACCUMULATIONS** vol 35 (Reissue) PARA 1006; **LIMITATION PERIODS** vol 68 (2008) PARA 1022; and cf *Earl of Chesterfield's Case* (1665) Hard 409; *Robinson v Giffard* [1903] 1 Ch 865. Such estates can be dealt with under the Settled Land Act 1925 unless the land was purchased with money provided by Parliament for public services: see s 20(1)(i); and **SETTLEMENTS** vol 42 (Reissue) PARA 762. The restriction on alienation in s 20(1)(i) was excluded in the case of the Trafalgar Estates by the Trafalgar Estates Act 1947 s 2(2): see **REAL PROPERTY** vol 39(2) (Reissue) PARA 133.

6 *Duke of Grafton v London and Birmingham Rly Co* (1838) 5 Bing NC 27 at 36-37; *A-G v Duke of Richmond (No 2)* [1907] 2 KB 940.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(4) SUBJECTS OF GIFTS/(i) In general/223. Realty and chattels real.

## 223. Realty and chattels real.

Gifts of land are usually termed voluntary conveyances<sup>1</sup>. Prima facie a deed of gift of land passes all the buildings on it, and the rights enjoyed with it<sup>2</sup>.

A gift of an advowson or right of presentation to a benefice is not valid unless the statutory requirements governing the transmission of patronage are observed<sup>3</sup>. Where the registered patron of a benefice, or the representative of that patron, is a clerk in Holy Orders or is the wife of such a clerk, that clerk is disqualified for presentation to that benefice<sup>4</sup>.

1 As to the avoidance of voluntary conveyances to defraud creditors or subsequent purchasers see PARA 262; **EQUITY** vol 16(2) (Reissue) PARA 437; **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 409, 663 et seq.

2 See the Law of Property Act 1925 s 62; and see generally **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 236 et seq; **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 57. As to tithes and tithe rentcharges see **ECCLIASTICAL LAW** vol 14 PARA 1209 et seq; see also *Chapman v Gatcombe* (1836) 2 Bing NC 516; *Public Trustee v Duchy of Lancaster* [1927] 1 KB 516, CA.

3 See the Patronage (Benefices) Measure 1986; and **ECCLIASTICAL LAW**. The special restrictions on dealing with advowsons are not affected by the Law of Property Act 1925: see s 201(2); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 335, 347.

- 4 See the Patronage (Benefices) Measure 1986 s 10; and **ECCLESIASTICAL LAW**.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(4) SUBJECTS OF GIFTS/(i) In general/224. Pure personality.

## 224. Pure personality.

At law only an absolute interest in chattels can be given inter vivos, and a grant of chattels for life vests the whole legal interest in the grantee to whom they are given for life<sup>1</sup>. Through the medium of trusts, limited interests can be created in any chattels, except in things which are exhausted by personal use, which, unless they consist of the stock-in-trade of a business or farming stock<sup>2</sup>, cannot be given for less than an absolute interest<sup>3</sup>. Wild animals, while unreclaimed, cannot be the subject of a gift<sup>4</sup>. There is said to be no property in a dead body<sup>5</sup>, so that a person cannot dispose of his own body either by will or by any other instrument<sup>6</sup>, although he may consent to his body or any part of it being used for the purposes of medical research or connected purposes<sup>7</sup>. A person also cannot dispose of the body of anyone else by way of gift<sup>8</sup>.

1 See eg *Re Price* [1928] Ch 579 at 590; and **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1227.

2 *Groves v Wright* (1856) 2 K & J 347; *Myers v Washbrook* [1901] 1 KB 360; cf *Breton v Mockett* (1878) 9 ChD 95; and see **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1230; **WILLS** vol 50 (2005 Reissue) PARA 413.

3 See **EQUITY** vol 16(2) (Reissue) PARA 608; **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1230.

4 *Shep Touch* (7th Edn) 241; and see **ANIMALS** vol 2 (2008) PARA 711 et seq.

5 Parts of corpses are, however, capable of being property within the meaning of the Theft Act 1968, at least if they have acquired different attributes by virtue of the application of skill of dissection and preservation techniques for exhibition and teaching purposes: see *R v Kelly*, *R v Lindsay* [1999] QB 621, [1998] 3 All ER 741, CA; and **CREMATION AND BURIAL** vol 10 (Reissue) PARA 905. As to gifts and appropriation for the purposes of the Theft Act 1968 see PARA 266.

6 See *Williams v Williams* (1882) 20 ChD 659; and **CREMATION AND BURIAL** vol 10 (Reissue) PARA 902; **WILLS** vol 50 (2005 Reissue) PARA 333.

7 See the Human Tissue Act 2004 Pt 1 (ss 1-12); and **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARA 250 et seq.

8 *R v Sharpe* (1857) Dears & B 160, CCR; *R v Fox* (1841) 2 QB 246; *R v Scott* (1842) 2 QB 248n; *Williams v Williams* (1882) 20 ChD 659. As to the duty to dispose of a body by means of cremation or burial see **CREMATION AND BURIAL** vol 10 (Reissue) PARA 903.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(4) SUBJECTS OF GIFTS/(i) In general/225. Choses or things in action.

## 225. Choses or things in action.

With certain exceptions, choses or things in action are assignable, and may be the subjects of gift<sup>1</sup>, but a mere expectancy, such as an expectation of succession to property, as the possible heir or one of the possible next of kin of a living person, is not a title to property by English law<sup>2</sup> and a voluntary assignment of such an expectancy, even though made by deed, will not be enforced<sup>3</sup> and is wholly inoperative both at law and in equity<sup>4</sup>, although an assignment of it for value would be supported in equity as a contract<sup>5</sup>. It follows that gifts of mere expectancies or

possibilities cannot be made. A possibility coupled with an interest is more than a possibility: it is a present interest alienable by deed and may validly be given<sup>6</sup>.

A general assignment of book debts or any class of them should be registered as a bill of sale; otherwise, as regards any book debts not paid at the commencement of the donor's bankruptcy, it will be void as against his trustee in bankruptcy<sup>7</sup>.

A promissory note not given for value does not constitute the payee a creditor<sup>8</sup>, but where a promissory note, not given for value, has been cancelled and a fresh one given on a compromise and interest paid under it, the fresh note will be paid before legacies<sup>9</sup>.

1 See the Law of Property Act 1925 s 136; and **CHOSSES IN ACTION** vol 13 (2009) PARA 72 et seq. As to choses or things in action not capable of assignment see **CHOSSES IN ACTION** vol 13 (2009) PARA 92 et seq.

2 *Re Parsons, Stockley v Parsons* (1890) 45 ChD 51 (differing from *Re Beaupré's Trusts* (1888) 21 LR Ir 397, CA); *Allcard v Walker* [1896] 2 Ch 369; *Re Chichester's Estate* [1908] 1 IR 297, CA; see also *Lord Dursley v Fitzhardinge Berkeley* (1801) 6 Ves 251 at 260; *Smith v A-G* (1777) cited in 6 Ves 260; *Davis v Angel* (1862) 4 De GF & J 524; *Clowes v Hilliard* (1876) 4 ChD 413. On the same principle, a gift of income to the person who succeeds to a peerage on the death of the present holder is ineffective, since that person cannot be ascertained until the holder dies: *Re Midleton's Will Trusts, Whitehead v Earl of Midleton* [1969] 1 Ch 600, [1967] 2 All ER 834 (applying *Re Parsons, Stockley v Parsons*).

3 *Meek v Kettlewell* (1842) 1 Hare 464; affd (1843) 1 Ph 342; *Re Ellenborough, Towry Law v Burne* [1903] 1 Ch 697; *Re Brooks' Settlement Trusts, Lloyds Bank Ltd v Tillard* [1939] Ch 993, [1939] 3 All ER 920 (voluntary settlor of an expectation of succession could not be compelled to hand the property over to the trustees). But where trustees of a voluntary settlement have received the settlor's interest under a valid and unrevoked authority, that interest has become impressed with the trusts of the settlement and the court cannot compel the trustees to transfer the property back to the settlor: see *Re Bowden, Hulbert v Bowden* [1936] Ch 71; *Re Adlard, Taylor v Adlard* [1954] Ch 29, [1953] 2 All ER 1437. See also *Re Burton's Settlements, Scott v National Provincial Bank Ltd* [1955] Ch 82, [1954] 3 All ER 193; and see **SETTLEMENTS** vol 42 (Reissue) PARA 615.

4 *Re Tilt, Lampet v Kennedy* (1896) 74 LT 163.

5 *Tailby v Official Receiver* (1888) 13 App Cas 523 at 548, HL: see **CHOSSES IN ACTION** vol 13 (2009) PARA 30.

6 See the Law of Property Act 1925 s 4(2); and **REAL PROPERTY** vol 39(2) (Reissue) PARA 163. See also *Perry v Phelps* (1810) 17 Ves 173; *Re Parsons, Stockley v Parsons* (1890) 45 ChD 51 at 57; *Kekewich v Manning* (1851) 1 De GM & G 176, CA in Ch. The assignment in *Kekewich v Manning* was not of an expectancy, but of property: accordingly the decision has not overruled the rule as to expectancies stated in the text: see *Re Ellenborough, Towry Law v Burne* [1903] 1 Ch 697 at 700.

7 See the Insolvency Act 1986 s 344; **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 676; **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1854.

8 *Re Whitaker* (1889) 42 ChD 119 at 124, CA, per Cotton LJ: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1479.

9 *Dawson v Kearton* (1856) 3 Sm & G 186.

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## (ii) Gifts of Special Property or for Special Purposes

### 226. Property subject to a charge.

Where a person makes a gift of property which with other property is subject to a charge, and in the gift there is no reference to the charge, nor any covenant for title<sup>1</sup>, then, if the donor created the charge and is personally liable to pay it, the donee cannot be called on to pay any

part of it, as it is considered equitable that he who is under a personal obligation to pay the debt should bear it<sup>2</sup>, but if the donor took the property subject to the charge, whether he is or is not personally liable to pay it, the donee takes subject to the charge, or to a proportionate part of it if another property is also subject to it<sup>3</sup>.

1 See **SALE OF LAND** vol 42 (Reissue) PARA 349 et seq.

2 *Re Darby's Estate, Rendall v Darby* [1907] 2 Ch 465; *Re Best, Parker v Best* [1924] 1 Ch 42.

3 *Ker v Ker* (1869) IR 4 Eq 15, CA; *Re Best, Parker v Best* [1924] 1 Ch 42. See further **MORTGAGE** vol 77 (2010) PARA 636 et seq.

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## **227. Completion of building on land the subject of the gift.**

Where a person has entered into a contract with builders for the erection of a building on property which he has in his lifetime conveyed to another absolutely, and the contract is not completed at his death, that other cannot require its completion at the expense of the deceased's estate<sup>1</sup>. If, however, the property passes to his devisee as such, the devisee can have the contract completed at the expense of the real and personal estate of the deceased applicable to the discharge of his debts and liabilities<sup>2</sup>.

1 *Re Day, Sprake v Day* [1898] 2 Ch 510; cf *Ahmed Angullia Bin Hadjee Mohamed Salleh Angullia v Estate and Trust Agencies (1927) Ltd* [1938] AC 624, [1938] 3 All ER 106, PC.

2 See **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 764.

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## **228. Gifts for particular purposes.**

Where a person obtains an absolute conveyance or gift for a particular purpose, and afterwards makes use of it for another purpose, the court will interfere on the ground of fraud<sup>1</sup>, but the mere expression by the donee of his intention to use it in a particular way, without a contract, express or implied, that he will so use it, does not prevent him from using it in another way<sup>2</sup>. Thus, if a gross sum or the whole income of property is given, and if a special purpose is assigned for that gift, the court regards the gift as absolute and the purpose as merely the motive of the gift; and therefore the court will hold that the gift is good even though it may no longer be practicable to give effect to the declared purpose of the gift<sup>3</sup>. A donor cannot by any declaration as to his intention prevent an absolute gift falling within the operation of any covenant or bargain made by the donee in regard to it, such as a covenant in a marriage settlement (or, presumably, a civil partnership settlement<sup>4</sup>) to settle after-acquired property<sup>5</sup>.

1 *Young v Peachy* (1742) 2 Atk 254.

2 See *Jorden v Money* (1854) 5 HL Cas 185; *Maddison v Alderson* (1883) 8 App Cas 467, HL; *Re Fickus, Farina v Fickus* [1900] 1 Ch 331.

3 *Re Andrew's Trust, Carter v Andrew* [1905] 2 Ch 48 at 52-53 (citing *Re Sanderson's Trust* (1857) 3 K & J 497 at 503); *Barlow v Grant* (1684) 1 Vern 255; *Nevill v Nevill* (1701) 2 Vern 431; *Barton v Cooke* (1800) 5 Ves 461; *Hammond v Neame* (1818) 1 Swan 35; *Leche v Lord Kilmorey* (1823) Turn & R 207; *Lassence v Tierney* (1849) 1 Mac & G 551; *Re Skinner's Trusts* (1860) 1 John & H 102. Cf *Re Bowes, Earl of Strathmore v Vane* [1896] 1 Ch 507 (trust to lay out £5,000 on planting trees on settled estates: held persons entitled to estate were entitled to have the money whether the trees were actually so laid out or not).

4 Although the cases cited in note 5 pre-date the concept of civil partnerships, the Civil Partnership Act 2004 confers rights on civil partners in all practicable respects, and particularly in relation to financial matters, analogous to those enjoyed by married persons and decisions which on their facts relate only to marriage must be read in the light of this. As to marriage and civil partnership settlements generally see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARAS 710-712; **SETTLEMENTS** vol 42 (Reissue) PARA 628 et seq.

5 *Re Allnutt, Pott v Brassey* (1882) 22 ChD 275; *Scholfield v Spooner* (1884) 26 ChD 94, CA (where certain expressions by Wood V-C in *Re Mainwaring's Settlement* (1866) LR 2 Eq 487 to the contrary effect were dissented from); *Tremayne v Rashleigh* [1908] 1 Ch 681 at 687.

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## 229. Dangerous gifts.

It is possible that the donor of a gift, the enjoyment of which causes injury to the donee, will ordinarily not be liable for the injury, unless at the time of the gift he knew of the danger to the donee and did not warn him<sup>1</sup>; but the rule that the gift must be enjoyed as it is given and taken with its risks is subject to this, that if the donor knows of some evil character in it at the time and does not warn the donee he is responsible, even though it was a gift<sup>2</sup>. Moreover, liability may be independent of knowledge; for it seems that a donor will be responsible if the circumstances are such that the thing given was likely to be used without any previous examination or testing by the donee and in reliance on the donor's having taken care that the object should be fit for the use to which it was to be put, and if, in the absence of care, damage might result<sup>3</sup>. Liability, also, may not be limited to liability for damage to the donee; thus a parent will, it seems, be liable for giving a dangerous article to his child if a natural use of it by the child causes damage to a third person and if the circumstances were such that the making of the gift to the child was itself a negligent act<sup>4</sup>. Furthermore, a dangerous gift may involve criminal liability: thus it is an offence to make a gift of a shot gun or ammunition for a shot gun to a person under the age of 15<sup>5</sup>; or to make a gift of an air weapon or ammunition for an air weapon to a person under the age of 18<sup>6</sup>; or to give any other sort of firearm or ammunition for it to a person under the age of 14<sup>7</sup>; and it is also an offence to give to another person a flick knife or a gravity knife<sup>8</sup>.

1 *Gautret v Egerton* (1867) LR 2 CP 371, where it was said that there must be something like fraud on the part of the giver before he can be made liable. See **NEGLIGENCE** vol 78 (2010) PARA 62 et seq.

2 *Lowery v Walker* [1910] 1 KB 173 at 190, CA, per Buckley LJ; revsd on another point [1911] AC 10, HL; see also *Indermaur v Dames* (1866) LR 1 CP 274 at 286 per Willes J; affd (1867) LR 2 CP 311, Ex Ch.

3 This follows, it is thought, from *M'Alister (or Donoghue) v Stevenson* [1932] AC 562, HL; *Chapman (or Oliver) v Saddler & Co* [1929] AC 584, HL; for in such circumstances it would be the donor's duty either to have ensured that the article was not defective or to have made the requisite examination and warned the donee of any defect. See also *Hawkins v Coulsdon and Purley UDC* [1954] 1 QB 319 at 332-333, [1954] 1 All ER 97 at 104, CA, per Denning LJ.



4 See *Donaldson v McNiven* [1952] 2 All ER 691, CA, where the parent was held not to be liable for lack of supervision of the child, but the position would have been different if the act of making the gift to the child had itself been a negligent act (see *Donaldson v McNiven* at 691 per Lord Goddard CJ); see also *Gorely v Codd* [1966] 3 All ER 891, [1967] 1 WLR 19. As regards the liability of parents for torts committed by their children see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 26 et seq; and as regards negligence generally see **NEGLIGENCE** vol 78 (2010) PARA 1 et seq.

5 See the Firearms Act 1968 s 24(3); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 669.

6 See the Firearms Act 1968 s 24(4); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 670. Any reference to an air rifle, air pistol or air gun in the Firearms Acts 1968 to 1997 includes a reference to a rifle, pistol or gun powered by compressed carbon dioxide: see the Firearms (Amendment) Act 1997 s 48; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 633.

7 See the Firearms Act 1968 s 24(2); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 668.

8 See the Restriction of Offensive Weapons Act 1959 s 1(1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 705.

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### **230. Premium savings bonds and ISAs.**

Premium savings bonds are not transferable either during the lifetime or on the death of the registered holder<sup>1</sup>. The interest of an investor in an individual savings account ('ISA') cannot be transferred, although the account can be transferred to another account manager<sup>2</sup>. Such an interest may, however, be cashed in and the proceeds transferred by way of gift in the ordinary way.

1 See the Finance Act 1968 Sch 18 para 4; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1363.

2 See the Individual Savings Account Regulations 1998, SI 1998/1870, reg 4(6)(a), (f); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1201. These provisions also apply to personal equity plans (PEPs) which, by virtue of amendments made by the Personal Equity Plan (Amendment) Regulations 2007, SI 2007/2120, became stocks and shares ISAs as from 6 April 2008 (see the Personal Equity Plan Regulations 1989, SI 1989/469, reg 4(1) (amended by SI 2007/2120); and **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 739). Under a previous version of the Personal Equity Plan Regulations 1989, SI 1989/469, reg 4(1) (amended by SI 1998/1869), it was provided that it has not been possible to take out a new PEP since 5 April 1999.

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## **(5) MAKING A GIFT**

### **(i) Deed or Instrument in Writing**

#### **231. Land.**

In general a legal estate in land must be granted by deed<sup>1</sup>, and an instrument is not a deed unless it makes clear on its face that it is intended to be a deed by the person<sup>2</sup> making it,

whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise<sup>3</sup>, and it is validly executed<sup>4</sup> as a deed by that person<sup>5</sup>. It must be signed<sup>6</sup> by the donor in his presence and the presence of two witnesses who each attest the signature<sup>7</sup> and delivered as a deed by the donor or a person authorised to do so on his behalf<sup>8</sup>.

If the title to land is registered, a gift of the legal estate must be made by registered transfer<sup>9</sup>.

Registration of title to unregistered land is compulsory on the transfer of a qualifying estate<sup>10</sup> by way of gift in exactly the same way as on a transfer for valuable or other consideration<sup>11</sup>. Registration must normally take place within two months beginning with the date on which the relevant event occurs<sup>12</sup>. If the requirement of registration is not complied with, the transfer becomes void as regards the transfer of a legal estate, and the legal estate reverts to the transferor who holds it on a bare trust for the transferee<sup>13</sup>. Although no particular form of transfer is necessary in the case of unregistered land it is possible and convenient to use the appropriate form prescribed in the case of the transfer of a legal estate in registered land<sup>14</sup>.

Equitable interests in land, whether registered or unregistered, may be dealt with by way of gift off the register; such a disposition must be by writing signed by the donor, or by his agent lawfully authorised in writing to do so<sup>15</sup>. The owner of registered land can create and give to others limited interests in that land, for instance by creating a trust of land under which those others have limited interests, and those interests may be protected by notices or restrictions<sup>16</sup>.

1 See the Law of Property Act 1925 s 52(1); **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 14; **REAL PROPERTY** vol 39(2) (Reissue) PARA 235. For the exceptions see s 52(2); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 15. The imperfect gift of a house failed for this reason in *Pascoe v Turner* [1979] 2 All ER 945, [1979] 1 WLR 431, CA, though the gift of the contents was good: see PARA 237. The gift was effective, however, under the doctrine of proprietary estoppel: see **ESTOPPEL** vol 16(2) (Reissue) PARA 1089 et seq. Interests in land created orally, other than certain short leases which may be so created, have the effect of interests at will only: see the Law of Property Act 1925 s 54; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 101, 102.

2 Or, as the case may be, by the parties to it: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(2)(a); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 8.

3 See the Law of Property (Miscellaneous Provisions) Act 1989 s 1(2)(a); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 8. An instrument is not to be taken to make it clear on its face that it is intended to be a deed merely because it is executed under seal: see s 1(2A); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 8.

4 I.e. by the person making it, by a person authorised to execute it in the name or on behalf of that person, or by one or more of those parties or a person authorised to execute it in the name or on behalf of one or more of those parties: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(2)(b); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 8.

5 See the Law of Property (Miscellaneous Provisions) Act 1989 s 1(2)(b); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 8. Alternatively, it must be validly executed as a deed by one or more of the parties to it: see s 1(2)(b); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 8.

6 'Sign' includes an individual signing the name of the person or party on whose behalf he executes the instrument and making one's mark on the instrument, and 'signature' is construed accordingly: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(4A); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 33.

7 See the Law of Property (Miscellaneous Provisions) Act 1989 s 1(3)(a); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 33. There was generally no requirement to have a witness (except in the case of registered land) in relation to instruments delivered before 31 July 1990.

8 See the Law of Property (Miscellaneous Provisions) Act 1989 s 1(3)(b); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 33.

9 See the Land Registration Act 2002 s 27, Sch 2; the Land Registration Rules 2003, SI 2003/1417, rr 58, 206, 210, Sch 1; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 911-920, 1087, 1091.

- 10    le an estate in fee simple absolute in possession and a term of years absolute for a term of which more than seven years are unexpired: see the Law of Property Act 1925 s 1(1); the Land Registration Act 2002 s 3; **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 826; **REAL PROPERTY** vol 39(2) (Reissue) PARA 45.
- 11    See the Land Registration Act 2002 s 4(1)(a)(i); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 827.
- 12    See the Land Registration Act 2002 s 6(4); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 828. The registrar may extend the period under s 6(4), (5): see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 828.
- 13    See the Land Registration Act 2002 s 7(1), (2)(a); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 829.
- 14    This practice is recognised by the forms themselves where the box for insertion of the title number contains the rubric 'Leave blank if not yet registered'.
- 15    See the Law of Property Act 1925 s 53; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 24.
- 16    See the Land Registration Act 2002 Pt 4 (ss 32-47); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 995-1018. As to existing cautions and inhibitions under the former legislation see s 134, Sch 12 paras 2, 4; the Land Registration Rules 2003, SI 2003/1417, rr 218-223; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 854, 993, 994.

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## 232. Chattels.

Chattels can be conveyed by deed, but, except in the case of a British ship<sup>1</sup>, if possession is forthwith taken and retained by the donee, no conveyance is required<sup>2</sup>. A British registered ship or a share in it must be transferred by bill of sale duly attested and registered at her port of registry, unless the transfer will result in the ship ceasing to have a British connection<sup>3</sup>.

Where the possession remains with the donor, a complete gift of chattels should be effected by a bill of sale duly attested and registered under the Bills of Sale Act 1878<sup>4</sup>, otherwise the gift will be void as against the trustees or assignees in the donor's bankruptcy or liquidation, or under any assignment for the benefit of his creditors, and as against enforcement officers and other persons seizing chattels under execution against the grantor and every person on whose behalf the process of execution has been issued<sup>5</sup>. An instrument merely expressing a desire that a person should have a chattel, without any delivery of the chattel, will not pass any property in it<sup>6</sup>.

An assignment of movables valid by the law of the country where they are situated is good, even though the donor is domiciled in a country where it would not be valid<sup>7</sup>.

1    As to the meaning of 'British ship' see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 230.

2    *Ramsay v Margrett* [1894] 2 QB 18, CA; *French v Gething* [1922] 1 KB 236, CA.

3    See the Merchant Shipping Act 1995 Sch 1 para 2(1); the Merchant Shipping (Registration of Ships) Regulations 1993, SI 1993/3138, reg 44; and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARAS 306, 308. For an exception where the transfer is of a fishing vessel registered with simple registration see reg 43; and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 307.

4    The Bills of Sale Act 1878 continues to regulate bills of sale by way of absolute transfer, notwithstanding the repeal of s 8 by the Bills of Sale Act (1878) Amendment Act 1882 s 15: see *Swift v Pannell* (1883) 24 ChD 210; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1631. In *Webb v Whinney* (1868) 18 LT 523 it was held that a gift of chattels was no less a gift because after delivery the donor kept them in his possession for safe custody.

5 See the Bills of Sale Act 1878 s 8; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARAS 1849-1850. As to the chattels to which the Bills of Sale Act 1878 applies see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1662 et seq. As to execution see **CIVIL PROCEDURE** vol 12 (2009) PARA 1265 et seq.

6 *Douglas v Douglas* (1869) 22 LT 127.

7 *Re Korvine's Trust, Levashoff v Block* [1921] 1 Ch 343 at 348; cf *Weerasekera v Peiris* [1933] AC 190, PC; and see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 405.

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### 233. Shares in companies.

Some choses or things in action may be disposed of only by deed or instrument in writing<sup>1</sup>. Thus transfers of shares in companies formed under the provisions of the Companies Clauses Consolidation Act 1845 must be by deed<sup>2</sup>. Shares in a company registered under the Companies Act 1985<sup>3</sup> must be transferred in the manner provided by the company's articles of association<sup>4</sup> or by means of a stock transfer<sup>5</sup>, or in certain cases of specified securities, through a computerised system (an exempt transfer)<sup>6</sup> or without a written instrument in accordance with regulations<sup>7</sup>. Generally the transfer must not be registered unless a proper instrument of transfer has been delivered to the company<sup>8</sup>, or unless the transfer is an exempt transfer or is in accordance with the relevant regulations<sup>9</sup>. If Table A applies, the transfer must be executed by the transferor and, unless the share is fully paid, by the transferee<sup>10</sup>, and the transferee's title is not perfected until the transfer is registered or, perhaps, the transferee has a present absolute and unconditional right to have it registered<sup>11</sup>, but registration is not an act required to be done by the transferor so as to cause the gift to fail as being incomplete<sup>12</sup>.

1 As to the modes of transferring choses or things in action generally see **CHOSSES IN ACTION** vol 13 (2009) PARA 13 et seq.

2 See the Companies Clauses Consolidation Act 1845 s 14; and **COMPANIES** vol 15 (2009) PARA 1716.

3 As to the 'Companies Acts' see the Companies Act 2006 s 2; and **COMPANIES** vol 14 (2009) PARA 16.

4 See the Companies Act 2006 s 544(1); and **COMPANIES** vol 15 (2009) PARA 1055.

5 See the Stock Transfer Act 1963 s 1; and **COMPANIES** vol 14 (2009) PARA 400.

6 See the Stock Transfer Act 1982; and **COMPANIES** vol 14 (2009) PARA 430.

7 In accordance with regulations made under the Companies Act 2006 Pt 21 Chapter 2 (ss 783-790): see the Uncertificated Securities Regulations 2001, SI 2001/3755, and the Uncertificated Securities (Amendment) (Eligible Debt Securities) Regulations 2003, SI 2003/1633 (both made under the Companies Act 1989 s 207 (repealed), from which the Companies Act 2006 Pt 21 Chapter 2 derives); and **COMPANIES** vol 14 (2009) PARA 420.

8 See the Companies Act 2006 ss 770, 772, 773; and **COMPANIES** vol 14 (2009) PARAS 398-399, 414.

9 See the Companies Act 1985 s 770; and **COMPANIES** vol 14 (2009) PARAS 399, 414. The 'relevant regulations' are regulations made or having effect under the Companies Act 2006 Pt 21 Chapter 2: see note 7.

10 See the Companies (Tables A to F) Regulations 1985, SI 1985/805, reg 2, Schedule Table A art 23; and **COMPANIES** vol 14 (2009) PARA 78-79.

11 *Société Générale de Paris v Walker* (1885) 11 App Cas 20, HL; *Ireland v Hart* [1902] 1 Ch 522.

12 See PARA 267 et seq. Where an intending donor died before he had executed the transfers of debenture stock and shares which he had directed to be purchased out of his money, in his wife's name, it was held that the passing of the wife's name by the broker to the vendor on the Stock Exchange might complete the gift: see *Re Smith, Bull v Smith* (1901) 84 LT 835. As to transfers in blank see *Burgis v Constantine* [1908] 2 KB 484, CA; and *Re Tees Bottle Co Ltd, Davies' Case* (1876) 33 LT 834 (stated by Hall V-C in *Ortigosa v Brown, Janson & Co* (1878) 38 LT 145 to have been affirmed on appeal); and see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 28. As to the completion of incomplete gifts of shares see *Re Wale, Wale v Harris* [1956] 3 All ER 280, [1956] 1 WLR 1346; *Letts v IRC* [1956] 3 All ER 588, [1957] 1 WLR 201; and PARAS 268, 270.

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### 234. Life assurance policies.

An assignment of a life assurance policy must be by an instrument in writing, and in order to perfect the donee's title to the money assured by the policy notice of the assignment must be given to the insurance office<sup>1</sup>.

1 See the Policies of Assurance Act 1867 ss 3, 5; and **INSURANCE** vol 25 (2003 Reissue) PARA 549. There may, however, be a valid gift of the document constituting the policy without either assignment or notice, although the donee would be unable to recover the money assured by it: *Rummens v Hare* (1876) 1 ExD 169, CA; *Re Crankshaw* (1934) 78 Sol Jo 438; see **INSURANCE** vol 25 (2003 Reissue) PARA 545 et seq. See also *Barton v Gainer* (1858) 3 H & N 387, where it was held that a gift of a document securing a debt was good, although the debt itself did not pass. A memorandum indorsed on the policy authorising a person to draw the money is inoperative: *Re Williams, Williams v Ball* [1917] 1 Ch 1, CA. As to the right to receive payment of policy money, where policies are expressed to be effected for the benefit of third parties, see PARA 246; and **INSURANCE** vol 25 (2003 Reissue) PARA 557 et seq.

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### 235. Government stock and bonds and savings bank deposits.

Government stock and registered bonds are transferable in the manner provided by Treasury regulations<sup>1</sup>.

1 See the Finance Act 1942 s 47; the Government Stock Regulations 2004, SI 2004/1611; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1335 et seq.

Prior to 1 May 1979 it was possible for a depositor in a trustee savings bank, not under 16 years of age, to nominate any person to receive any sum not exceeding £1,500 due to the depositor at his death otherwise than in respect of current account deposits; and prior to 1 May 1981 a depositor in the National Savings Bank or a holder of National Savings Certificates, not under 16 years of age, could nominate any person to receive any sum due to the depositor or holder at his death in respect of his deposits or certificates: see the Trustee Savings Bank Regulations 1972, SI 1972/583, regs 11-15; the National Savings Bank Regulations 1972, SI 1972/764, regs 33-3; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 814, 1350. The powers were withdrawn on the dates respectively mentioned. As to municipal savings banks see *Re Kimber, Vale v Rockman* [1928] Ch 749.

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### **236. Property in friendly societies, etc.**

A member, who is not under 16, of a registered friendly society (other than a benevolent society, working men's club or old people's home society) may nominate in writing a person to whom any sum of money, not exceeding £5,000, payable by the society or any branch of it on the member's death is to be paid<sup>1</sup>. Similarly a member, not under 16, of a registered industrial and provident society may by writing delivered at or sent to the society's office during his life, or made in a book kept there, nominate a person or persons to whom his property in the society is to be transferred at his death, to the extent of £5,000<sup>2</sup>. There are similar provisions in regard to members of a trade union<sup>3</sup>.

Pension schemes normally provide for death benefits to be paid at the discretion of the trustees to one or more of the persons in a named class living at the date of the member's death in such shares as the trustees may decide. The named class normally includes any person or charity named in a nomination signed by the member and deposited with the trustees before his death or named as a beneficiary under any will made by him<sup>4</sup>.

1 See the Friendly Societies Act 1974 s 66; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2230. This limit may be further increased by Treasury order: see the Administration of Estates (Small Payments) Act 1965 s 6(1)(e); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2231.

2 See the Industrial and Provident Societies Act 1965 s 23; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2503.

3 See the Trade Union (Nominations) Regulations 1977, SI 1977/789; and **EMPLOYMENT** vol 40 (2009) PARAS 879-880.

4 Such a nomination is thought not to fall within the provisions of the Law of Property Act 1925 s 53(1)(c) (disposition of an equitable interest or trust required to be in writing, etc: see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 24): *Re Danish Bacon Co Ltd Staff Pension Fund, Christenson v Arnett* [1971] 1 All ER 486, [1971] 1 WLR 248; *Gold v Hill* [1999] 1 FLR 54, [1998] Fam Law 664.

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### **(ii) Delivery**

#### **237. Necessity for delivery.**

As already observed<sup>1</sup>, there cannot be a gift without a giving and a taking<sup>2</sup>. Gifts of chattels are more often made by delivery than by deed. It is well settled that, if there is no deed, a gift of chattels is not complete unless accompanied by delivery. Actual delivery is not mere evidence of the gift, but is part of the gift itself, so that an oral gift of chattels without delivery passes no property to the donee, and is not a gift at all<sup>3</sup>. To constitute delivery the act must be such, or be accompanied by such words, as to be unequivocal<sup>4</sup>.

1 See PARA 202.

2 As to incomplete gifts see PARA 267 et seq.

3 *Shower v Pilck* (1849) 4 Exch 478; *Trimmer v Danby* (1856) 25 LJCh 424; *Bourne v Fosbrooke* (1865) 18 CBNS 515; *Cochrane v Moore* (1890) 25 QBD 57, CA. The last case establishes the law as correctly laid down by the Court of King's Bench in *Irons v Smallpiece* (1819) 2 B & Ald 551, and overrules the statements of the law on this point by Pollock B in *Re Harcourt*, *Danby v Tucker* (1883) 31 WR 578; and by Cave J in *Re Ridgway, ex p Ridgway* (1885) 15 QBD 447. 'If the gift does not take effect, by delivery of immediate possession, it is then not properly a gift, but a contract': 2 Bl Com (14th Edn) 441. The attempted gift of a motor car without delivery or change of garage or registration is ineffectual: *Valier v Wright and Bull Ltd* (1917) 33 TLR 366; and see *Re Churchill*, *Taylor v Manchester University* [1917] 1 Ch 206.

4 As to gifts between spouses and civil partners see PARA 205.

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### 238. Constructive delivery.

Actual manual delivery by the donor to the donee of a chattel is not essential to complete the gift of it although an oral gift without some act of delivery will not affect the ownership of the thing purported to be given<sup>1</sup>. It is sufficient if the donee is put by the donor in possession of the chattel<sup>2</sup>, or if the donee obtains possession with the donor's consent<sup>3</sup>. Where chattels cannot be actually delivered owing to their bulk, they can be constructively delivered, for example by the delivery of the key of a warehouse in which they are stored<sup>4</sup>, or by delivery of part as representing the whole, for instance a chair for all the furniture<sup>5</sup>.

The delivery need not be made at the time of the gift, delivery first and gift afterwards being as effectual as gift first and delivery afterwards<sup>6</sup>. Where the donor's chattel is already in the possession of another, although not for the purpose of an intended gift, an effectual oral gift of it to that other person may be made without any further delivery to him<sup>7</sup>. A gift to one for a third person's use is a sufficient delivery to vest the property in the third person<sup>8</sup>.

1 *Smith v Smith* (1733) 2 Stra 955. A physical transfer of the trust property was not required in *Jaffa v Taylor Gallery Ltd*, *Jaffa v Harris* (1990) Times, 21 March, where the trust property, a painting, was in the hands of a third party as agent of the settlor. By a document the settlor purported to give the painting to his three children and, two of the children being minors, the settlor 'placed their interests in the hands of trustees'. The declaration of trust was held to constitute a transfer of property in the painting to the trustees, the judge observing that he 'could not conceive that a physical transfer had to take place and indeed it would be absurd so to find when one trustee was in Northern Ireland, another in England, and when the third owner was the adult third plaintiff'. The report does not state whether or not the document was made as a deed.

2 *Winter v Winter* (1861) 4 LT 639, where a barge was given to the donor's employee, who had previously been in possession of it as such employee, and kept possession of it afterwards; *Kilpin v Ratley* [1892] 1 QB 582, where a father to whom the furniture in his daughter's house had been assigned by a duly registered bill of sale came to the house and orally gave the furniture to his daughter and left her in the room with it; see also *Re Alderson*, *Alderson v Peel* (1891) 64 LT 645, but possibly this last case is not consistent with *Cochrane v Moore* (1890) 25 QBD 57, CA; see *Kilpin v Ratley* per Wills J; cf *Richer v Voyer* (1874) LR 5 PC 461; *Cain v Moon* [1896] 2 QB 283; and *Re Cole (a bankrupt), ex p Trustee of Property of Bankrupt v Cole* [1964] Ch 175, [1963] 3 All ER 433, CA.

3 *Thomas v Times Book Co Ltd* [1966] 2 All ER 241, [1966] 1 WLR 911, where the donee was told that if he could find a missing manuscript he could keep it.

4 *Ryall v Rowles* (1750) 1 Ves Sen 348; and see *Smith v Smith* (1733) 2 Stra 955, where a lodger left the key to his room with the owner of the house and it was held that there was a sufficient constructive delivery of the contents of the room to the owner's wife. On the same principle the property in a church organ has been held to pass by constructive delivery: *Rawlinson v Mort* (1905) 93 LT 555. Cf *Dublin City Distillery Ltd v Doherty* [1914] AC 823, HL, a case of pledge, but where constructive delivery is discussed. A mere symbol, such as a coin, would not be sufficient: see *Ward v Turner* (1752) 2 Ves Sen 431 at 442-443. As to constructive delivery of a gift mortis causa see PARA 273.

5 *Lock v Heath* (1892) 8 TLR 295. The question has been raised whether a gift of an undivided fourth part of a horse admitted of delivery or whether it was to be regarded as incorporeal and incapable of delivery. The point was, however, left undecided, the court holding that what took place between the parties amounted to a declaration of trust: *Cochrane v Moore* (1890) 25 QBD 57 at 73, CA.

6 *Cochrane v Moore* (1890) 25 QBD 57 at 70, CA; *Cain v Moon* [1896] 2 QB 283; *Valier v Wright and Bull* (1917) 33 TLR 366, where possession taken by the donee but not given by the donor after the alleged gift was held insufficient.

7 *Kilpin v Ratley* [1892] 1 QB 582 at 585 per Wills J; *Cain v Moon* [1896] 2 QB 283 at 289 per Wills J; *Re Stoneham, Stoneham v Stoneham* [1919] 1 Ch 149; *Pascoe v Turner* [1979] 2 All ER 945, [1979] 1 WLR 431, CA (defendant already in possession as bailee when gift declared); *Woodard v Woodard* [1995] 3 All ER 980, [1992] RTR 35, CA; but see *Shower v Pilck* (1849) 4 Exch 478, which conflicts with the statement in the text, and see the observations on the last-mentioned case in *Cochrane v Moore* (1890) 25 QBD 57 at 61, CA. The decision, however, in *Shower v Pilck* can be supported on the ground that there were no words of present gift. As to the necessity for words of present gift see also *Otway v Gibbs* [2001] 2 LRC 302, [2000] All ER (D) 1615, PC.

8 *Lucas v Lucas* (1738) 1 Atk 270.

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### **239. Choses or things in action.**

By the law merchant and for the convenience of trade or business some choses or thing in action pass by delivery, such as bills of exchange and promissory notes<sup>1</sup>, exchequer bills, cheques to bearer, and bonds and debentures to bearer<sup>2</sup>, and gifts of them can, therefore, be validly effected by delivery to the donee.

1 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1403, 1489.

2 Cf *Bechuanaland Exploration Co v London Trading Bank Ltd* [1898] 2 QB 658; see **CHOSSES IN ACTION** vol 13 (2009) PARA 62. See also *Donald v Donald* 1953 SLT (Sh Ct) 69 (delivery of savings certificates by handing over registration card, although certificates retained by donor).

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### **(iii) Declaration of Trust**

#### **240. Declaration of trust by donor of full age and capacity.**

If an intending donor of full age and capacity declares a trust for another, although for no consideration, it is binding generally on the creator of the trust and irrevocable by him unless power of revocation is expressly reserved, and the donee takes an equitable and enforceable interest whatever the nature of the property affected by the trust<sup>1</sup>. It is immaterial whether or not the declaration of trust has been communicated to the donee<sup>2</sup>. A trust may be created even though there is no expression in terms importing confidence<sup>3</sup>, but the court must be satisfied that there was a present and irrevocable intention on the part of the alleged trustee to declare himself a trustee<sup>4</sup>.

A declaration of trust of land must be in writing, signed by the person who can by law declare the trust<sup>5</sup>, but a trust of pure personalty can be declared orally<sup>6</sup>, although it cannot be assigned



without writing<sup>7</sup>. If the legal estate or right in the property given is in a third person there must be sufficient evidence of a declaration of trust by the owner of the equitable interest<sup>8</sup>.

1 *New, Prance and Garrard's Trustee v Hunting* [1897] 2 QB 19, CA; affd sub nom *Sharp v Jackson* [1899] AC 419, HL; *Radcliffe v Abbey Road and St John's Wood Permanent Building Society* (1918) 87 LJCh 557, where a defaulting trustee made a declaration of trust of some of his own property for the trust; and see **TRUSTS** vol 48 (2007 Reissue) PARA 667. As to disclaimer by the person originally appointed as trustee see PARA 250.

2 *Tate v Leithead* (1854) Kay 658; *New, Prance and Garrard's Trustee v Hunting* [1897] 2 QB 19, CA; affd sub nom *Sharp v Jackson* [1899] AC 419, HL. Knowledge of a gift is not necessary for its validity; acceptance by the donee will be presumed: see PARA 249.

3 *Page v Cox* (1852) 10 Hare 163; *Milroy v Lord* (1862) 4 De GF & J 264, CA in Ch; *Re Flavell, Murray v Flavell* (1883) 25 ChD 89, CA. See also *Paul v Constance* [1977] 1 All ER 195, [1977] 1 WLR 527, CA.

4 *Re Cozens, Green v Brisley* [1913] 2 Ch 478, where it was held that the absence of communication to anyone, where entries were made in pencil in a private account, raised a strong inference against a trust.

5 See the Law of Property Act 1925 s 53(1)(b) (replacing the Statute of Frauds (1677) s 7 (repealed)); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 24.

6 See eg *M'Fadden v Jenkyns* (1842) 1 Ph 153, where it was held that an oral message to a debtor, desiring him to hold the debt in trust for a third person, creates a binding trust: see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 24; **TRUSTS** vol 48 (2007 Reissue) PARA 644.

7 See the Law of Property Act 1925 s 53(1)(c) (replacing the Statute of Frauds (1677) s 9 (repealed)); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 24. The Law of Property Act 1925 s 53(1)(c) is, however, inapplicable where the beneficial owner of the whole beneficial estate is able to give directions to his bare trustee to deal with the legal estate as well as the equitable estate: *Vandervell v IRC* [1967] 2 AC 291, [1967] 1 All ER 1, HL; *Re Vandervell's Trusts (No 2)*, *White v Vandervell Trustees Ltd* [1974] Ch 269 at 308, [1974] 3 All ER 205, CA. Nor does the Law of Property Act 1925 s 53(1)(c) apply to any transfer of title to uncertificated units of a security by means of a relevant system and any disposition or assignment of an interest in uncertificated units of a security title to which is held by a relevant nominee: see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 38(5), (6); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1622.

8 *Harding v Harding* (1886) 17 QBD 442; *Re Earl of Lucan, Hardinge v Cobden* (1890) 45 ChD 470 at 474. As to the general requisites of a declaration of trust see **TRUSTS** vol 48 (2007 Reissue) PARA 644 et seq.

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## (iv) Resulting Trusts and Presumptions of Equity

### 241. Purchase in another's name.

Where a person buys real or personal property and pays the purchase money, or part of it, but takes the purchase in the name of another, who is neither his child, adopted child nor spouse or civil partner<sup>1</sup>, prima facie there is no gift, but a resulting trust for the person paying the money<sup>2</sup>. The rule applies to the case where several persons purchase property in the name of one<sup>3</sup>, and to the case of a purchase taken in the joint names of the person paying the money and of another<sup>4</sup>. The same rule applies to the case of a voluntary transfer of pure personalty<sup>5</sup> into the name of another jointly with the transferor<sup>6</sup> or into that other's name alone<sup>7</sup>. Proof of payment of money prima facie imports an obligation to repay in the absence of any circumstances tending to show anything in the nature of a presumption of advancement<sup>8</sup>.

1 Although decisions cited in notes 2-8 pre-date the concept of civil partnerships, the Civil Partnership Act 2004 confers rights on civil partners in all practicable respects, and particularly in relation to financial matters, analogous to those enjoyed by married persons and decisions which on their facts relate only to marriage must be read in the light of this. As to the legal incidents of marriage and civil partnership generally see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 203 et seq.

2 *Earl of Plymouth v Hickman* (1690) 2 Vern 167; *Dyer v Dyer* (1788) 2 Cox Eq Cas 92; *The Venture* [1908] P 218, CA; *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL; *Gross v French* (1975) 238 Estates Gazette 39, CA. See also **EQUITY** vol 16(2) (Reissue) PARA 853; **TRUSTS** vol 48 (2007 Reissue) PARA 705 et seq.

3 *Wray v Steele* (1814) 2 Ves & B 388; *Bull v Bull* [1955] 1 QB 234, [1955] 1 All ER 253, CA; *Diwell v Farnes* [1959] 2 All ER 379, [1959] 1 WLR 624, CA.

4 *Rider v Kidder* (1805) 10 Ves 360.

5 As to a voluntary conveyance of real property see PARA 242.

6 *Fowkes v Pascoe* (1875) 10 Ch App 343, CA; *Re Vinogradoff, Allen v Jackson* [1935] WN 68. As to money placed on deposit see *Doyle v Byrne* (1922) 56 ILT 125; *Owens v Greene* [1932] IR 225; *Young v Sealey* [1949] Ch 278, [1949] 1 All ER 92.

7 *Down v Ellis* (1865) 35 Beav 578; *Re Howes, Howes v Platt* (1905) 21 TLR 501; *Vandervell v IRC* [1967] 2 AC 291, [1967] 1 All ER 1, HL; *Crane v Davis* (1981) Times, 13 May. See also **EQUITY** vol 16(2) (Reissue) PARA 853. As to resulting trusts generally see **TRUSTS** vol 48 (2007 Reissue) PARA 705 et seq.

8 *Seldon v Davidson* [1968] 2 All ER 755, [1968] 1 WLR 1083, CA.

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## 242. Rebuttal of presumption of resulting trust.

The presumption that no gift is intended can be rebutted by sufficient evidence, even though it may be that of the person in whose name the purchase has been made<sup>1</sup>. The surrounding circumstances must be taken into consideration<sup>2</sup>. If a transfer into the joint names is accompanied by an expressed wish as to the mode of employing the property transferred and a declaration that no legal obligation is intended to be imposed, the presumption of a resulting trust is rebutted<sup>3</sup>.

The fact that the transferor retains control during his lifetime over the property transferred into the joint names does not prevent the gift, even where it appears to be of a testamentary nature and not in conformity with the Wills Act 1837, from being an effective and complete gift inter vivos from the time of making, so as to vest the legal title to the property in the donee by survivorship on the death of the transferor<sup>4</sup>.

In a voluntary conveyance of real property, a resulting trust for the grantor is no longer implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee<sup>5</sup>, but if a conveyance is expressed to be for valuable consideration, although in fact none was paid, the grantee, if he asserts that a gift was intended, must produce the clearest evidence of the alleged donor's intention, otherwise there may be a resulting trust for the grantor<sup>6</sup>.

1 *Maddison v Andrew* (1747) 1 Ves Sen 57; *Fowkes v Pascoe* (1875) 10 Ch App 343, CA. See also **TRUSTS** vol 48 (2007 Reissue) PARA 713.

2 *Mercier v Mercier* [1903] 2 Ch 98, CA: see **TRUSTS** vol 48 (2007 Reissue) PARA 717.

3 *Wheeler v Smith* (1860) 1 Giff 300.

4 *Young v Sealey* [1949] Ch 278, [1949] 1 All ER 92, approving the decision in *Re Reid* (1921) 50 OLR 595, 64 DLR 598, and not applying *Owens v Greene* [1932] IR 225.

5 See the Law of Property Act 1925 s 60(3); **REAL PROPERTY** vol 39(2) (Reissue) PARA 245; **TRUSTS** vol 48 (2007 Reissue) PARA 718. In *Lohia v Lohia* [2001] WTLR 101; affd [2001] EWCA Civ 1691, [2001] All ER (D) 375 (Oct), (2002) 16 Tru LI 231, it was held at first instance that the effect of this provision is that a voluntary conveyance does not give rise to a presumption of a resulting trust, but the Court of Appeal preferred to express no opinion on the point. See also *Hodgson v Marks* [1971] Ch 892, [1971] 2 All ER 684, CA; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 59.

6 *Hughes v Seanor* (1869) 18 WR 108; on appeal (1870) 18 WR 1122; *Coultwas v Swan* (1870) 22 LT 539; affd (1871) 19 WR 485, CA; and see *Bridgman v Green* (1755) 2 Ves Sen 627.

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### 243. Surplus of voluntary subscriptions.

If money is publicly subscribed for the benefit of certain persons and the facts do not show that it was intended to become their absolute property, the money unapplied at their deaths will be subject to a resulting trust for the donors and their representatives<sup>1</sup>, but if money is subscribed for the education of children and some remains after they are grown up, the intention may be that the money remaining then is to provide for the children and thus belong to them absolutely<sup>2</sup>.

Where there is a public appeal for subscriptions to a fund for a charitable purpose and either the purpose proves to be impracticable or it requires less money than is actually given, the destination of surplus funds depends both upon whether or not a general charitable intention can be found and upon the manner in which the subscriptions were made, so that the surplus will not necessarily have to be returned to the donors but may be applicable *cy-près*<sup>3</sup>. On the other hand, where donations are made or are taken to have been made out and out for a non-charitable purpose, any surplus will be *bona vacantia* and as such will pass to the Crown<sup>4</sup>. So if honorary members of a friendly society which is not a charity make absolute gifts to it, and all the beneficial interest in the society's funds is exhausted, there is no resulting trust of the surplus in favour of the honorary members, but it passes as *bona vacantia*<sup>5</sup>.

1 *Re Abbott Fund Trusts, Smith v Abbott* [1900] 2 Ch 326; and see the cases cited in **CHARITIES** vol 8 (2010) PARA 175. See also **TRUSTS** vol 48 (2007 Reissue) PARA 708.

2 *Re Andrew's Trust, Carter v Andrew* [1905] 2 Ch 48; and see PARA 228. See also *Re Osoba, Osoba v Osoba* [1978] 2 All ER 1099, [1978] 1 WLR 791; varied [1979] 2 All ER 393, [1979] 1 WLR 247, CA.

3 See the Charities Act 1993 s 14; and **CHARITIES** vol 8 (2010) PARAS 173-176.

4 *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts, Barnett v Ketteringham* [1971] Ch 1, [1970] 1 All ER 544; *Davis v Richards & Wallington Industries Ltd* [1991] 2 All ER 563, [1990] 1 WLR 1511, where it was said that the terms of the gift may exclude a resulting trust expressly or by implication.

5 *Braithwaite v A-G* [1909] 1 Ch 510; cf **CLUBS** vol 13 (2009) PARA 293. See also **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 614; **TRUSTS** vol 48 (2007 Reissue) PARAS 708, 710, 712.

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## 244. Presumption of advancement.

Where the person in whose name a purchase or transfer is taken is the spouse or civil partner<sup>1</sup>, child<sup>2</sup> or adopted child<sup>3</sup> of the person paying the purchase money or making the transfer, there is a presumption that a gift was intended<sup>4</sup>. The rule has been extended to the case of an illegitimate child<sup>5</sup> and to that of a grandchild whose father is dead<sup>6</sup> when the father and grandfather, respectively, have placed themselves in loco parentis, but has been held not to have applied in the case of a woman with whom the alleged donor had gone through a form of marriage, but whom he could not legally marry<sup>7</sup>, or with whom he merely cohabited<sup>8</sup>. The presumption that a gift is intended may exist notwithstanding that the spouse or civil partner or parent has actually received the income during his life and made leases of the property<sup>9</sup>.

1 See *Re Eykyn's Trusts* (1877) 6 ChD 115. Although decisions cited in notes 2-9 pre-date the concept of civil partnerships, the Civil Partnership Act 2004 confers rights on civil partners in all practicable respects, and particularly in relation to financial matters, analogous to those enjoyed by married persons and decisions which on their facts relate only to marriage must be read in the light of this. As to the legal incidents of marriage and civil partnership generally see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 203 et seq.

The strength of the presumption in relation to a wife has been much diminished with changing conditions of society (see *Silver v Silver* [1958] 1 All ER 523 at 525, [1958] 1 WLR 259 at 261-266, CA, per Lord Evershed MR; *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL; *Harwood v Harwood* [1991] 2 FLR 274, CA; and contrast *Tinker v Tinker* [1970] P 136, [1970] 1 All ER 540, CA), and the extension of these provisions to include civil partners must be considered accordingly. The presumption has been said to be stronger in the case of an intended wife, provided that the marriage was subsequently duly solemnised: *Moate v Moate* [1948] 2 All ER 486. Cf *Zamet v Hyman* [1961] 3 All ER 933, [1961] 1 WLR 1442, CA; *Cavalier v Cavalier* (1971) 19 FLR 199.

It has also been held that there is no presumption of a gift where the purchase or investment is made by a mother, even though living apart from her husband, or a widow, in the name of her child or in the joint names of herself and her child: see *Re De Visme* (1863) 2 De GJ & Sm 17; *Gross v French* (1974) 232 Estates Gazette 1319; affd (1975) 238 Estates Gazette 39, CA; *Sekhon v Alissa* [1989] 2 FLR 94. In *Batstone v Salter* (1875) 10 Ch App 431, Lord Cairns LC and James LJ held that a gift in favour of the surviving son-in-law was to be presumed where a mother invested stock in the joint names of herself, her daughter and her daughter's husband. It was also formerly held that in the case of a widowed mother very little evidence to prove the intention of a gift was required: see *Bennet v Bennet* (1879) 10 ChD 474. See also *Re Orme, Evans v Maxwell* (1883) 50 LT 51 (mother, if she placed herself in loco parentis, was presumed to have intended a gift). However, it has recently been held, in relation to the rule against double portions, that both parents should nowadays be taken to be in loco parentis unless the contrary is proved (see *Re Cameron, Phillips v Cameron* [1999] Ch 386, [1999] 2 All ER 924; and cf the Children Act 1989 s 2(1); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 138 et seq), and it is thought that this view would now also be taken in relation to the presumption of advancement.

As to transactions of this nature between spouses and civil partners see further **TRUSTS** vol 48 (2007 Reissue) PARA 717.

2 *Dyer v Dyer* (1788) 2 Cox Eq Cas 92. There may arise between stepfather and stepson the relationship necessary to give rise to a presumption of advancement in the stepson's favour: *Re Paradise Motor Co Ltd* [1968] 2 All ER 625, [1968] 1 WLR 1125, CA. See **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 43; **TRUSTS** vol 48 (2007 Reissue) PARA 715.

3 A person adopted after 30 December 2005 is to be treated in law as if born as the child of the adopters or adopter: see the Adoption and Children Act 2002 s 67(1); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 377. A child adopted before that date is treated in law: (1) where the adopters are a married couple, as if he had been born as a child of the marriage; and (2) in any other case, as if he had been born to the adopters in wedlock: see the Adoption Act 1976 s 39(1); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 376. 30 December 2005 is the date on which the Adoption and Children Act 2002 was brought substantially into force by the Adoption and Children Act 2002 (Commencement No 9) Order 2005, SI 2005/2213: the legal status of a child adopted before that date is governed by the Adoption Act 1976, and the legal status of a child adopted after that date is governed by the Adoption Act 2002 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 375 et seq).

4 The presumption of gift arises from the moral obligation to give: *Bennet v Bennet* (1879) 10 ChD 474 at 477 per Sir George Jessel MR, differing from the reasoning in *Sayre v Hughes* (1868) LR 5 Eq 376.

5 *Beckford v Beckford* (1774) Lofft 490. The report in that case is unsatisfactory, but the rule is supported in *Soar v Foster* (1858) 4 K & J 152 at 157, 160. See further PARA 218; **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 125 et seq (removal of most consequences of illegitimacy); **TRUSTS** vol 48 (2007 Reissue) PARA 715.

6 *Ebrand v Dancer* (1680) 2 Cas in Ch 26. But where a copyhold interest was taken by a man in the name of an illegitimate grandchild whose father was living, it was held not to be an advancement, although the grandparent had brought up the grandchild: *Tucker v Burrow* (1865) 2 Hem & M 515. Copyholds were abolished by the Law of Property Act 1922 Pt V (ss 128-137) (largely repealed): see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 641 et seq; **REAL PROPERTY** vol 39(2) (Reissue) PARA 31 et seq.

7 *Soar v Foster* (1858) 4 K & J 152.

8 *Rider v Kidder* (1805) 10 Ves 360; *Crisp v Mullings* (1974) 233 Estates Gazette 511; revsd without discussing this point (1975) 239 Estates Gazette 119, CA.

9 *Lord Grey v Lady Grey* (1677) 2 Swan 594; *Mumma v Mumma* (1687) 2 Vern 19; *Lamplugh v Lamplugh* (1709) 1 P Wms 111; *Taylor v Taylor* (1737) 1 Atk 386; *Stamp Duties Comr v Byrnes* [1911] AC 386, PC. As to rebuttal see further PARA 247.

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## 245. Presumptions in other cases between spouses and civil partners.

The receipt by a spouse or civil partner<sup>1</sup> of his partner's income when they are living together in amity raises a strong presumption of a gift<sup>2</sup>. There is, however, no such presumption where one party receives the capital of the other's property but is prima facie a trustee for the other<sup>3</sup>, the burden of proving a gift lying on the recipient<sup>4</sup>.

There is no presumption that an investment of or purchase with one spouse or civil partner's money, whether capital or savings of income, in the other's name is a gift to that other spouse or civil partner<sup>5</sup>, although that spouse or civil partner may have a lien for any contributions they may have made<sup>6</sup>, and if one spouse or civil partner voluntarily assigns property to the other for a particular purpose, such as raising money, the property remains that of the assignor, subject to the fulfilment of the particular purpose<sup>7</sup>. Each case must depend on its particular circumstances, and in each the intention must be collected from the instrument which has given rise to the question<sup>8</sup>.

1 Although decisions cited in notes 2-8 pre-date the concept of civil partnerships, the Civil Partnership Act 2004 confers rights on civil partners in all practicable respects, and particularly in relation to financial matters, analogous to those enjoyed by married persons and decisions which on their facts relate only to marriage must be read in the light of this. As to the legal incidents of marriage and civil partnership generally see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 203 et seq.

2 *Caton v Rideout* (1849) 1 Mac & G 599; *Edward v Cheyne (No 2)* (1888) 13 App Cas 385, HL. Distinguish *Dixon v Dixon* (1878) 9 ChD 587; and see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 248. See also the Married Women's Property Act 1964 s 1 (which provides that if any question arises as to the right of a husband or wife to money derived from any allowance made by the husband for the expenses of the matrimonial home or for similar purposes, or to any property acquired out of such money, the money or property is, in the absence of any agreement between them to the contrary, treated as belonging to the husband and the wife in equal shares); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 245. 'Similar purposes' has been held not to include mortgage repayments towards the purchase of the family home: *Tymoszczuk v Tymoszczuk* (1964) 108 Sol Jo 676; doubted in *Re John's Assignment Trusts, Niven v Niven* [1970] 2 All ER 210n, [1970] 1 WLR 955.

3 *Wassell v Leggatt* [1896] 1 Ch 554 at 556 per Romer J; *Pearson v Pearson* (1965) Times, 30 November. See *Pettitt v Pettitt* [1970] AC 777 at 815, [1969] 2 All ER 385 at 407, HL, per Lord Upjohn; *Heseltine v Heseltine* [1971] 1 All ER 952, [1971] 1 WLR 342, CA.

4 *Re Flamank, Wood v Cock* (1889) 40 ChD 461.

5 *Mercier v Mercier* [1903] 2 Ch 98, CA.

6 *Neesom v Clarkson* (1845) 4 Hare 97.

7 *Re Duke of Marlborough, Davis v Whitehead* [1894] 2 Ch 133.

8 *Plomley v Felton* (1888) 14 App Cas 61 at 66, PC.

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## 246. Assurance policies.

Where a person takes out an assurance policy on his own life, expressed to be for the benefit of a third party, the policy money belongs to his estate<sup>1</sup> unless he has constituted himself a trustee for that third party<sup>2</sup>. A policy taken out by a spouse or civil partner on his own life and expressed to be for the benefit of his spouse or civil partner or children will create a trust in favour of the objects named in it<sup>3</sup>.

Premiums paid by a parent<sup>4</sup> in respect of a policy taken out by that parent on their child's life may be presumed to be made by way of advancement, in which case the child's estate will be entitled to the policy money<sup>5</sup>. Apart from this presumption of advancement in the case of such a policy, the policy money will belong to the child's estate if a trust has been effected in the child's favour<sup>6</sup>.

1 See *Pfleger v Browne* (1860) 28 Beav 391; *Re Webb, Barclays Bank Ltd v Webb* [1941] Ch 225, [1941] 1 All ER 321; *Re Foster's Policy, Menneer v Foster* [1966] 1 All ER 432, [1966] 1 WLR 222; *Swain v Law Society* [1983] 1 AC 598, [1982] 2 All ER 827, HL. As to resulting trusts generally see **TRUSTS** vol 48 (2007 Reissue) PARA 705 et seq.

2 *Re Engelbach's Estate, Tibbetts v Engelbach* [1924] 2 Ch 348. As to the right to receive payment under assurance policies see **INSURANCE** vol 25 (2003 Reissue) PARA 556 et seq.

3 See the Married Women's Property Act 1882 s 11; the Civil Partnership Act 2004 s 70; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 274. See also **INSURANCE** vol 25 (2003 Reissue) PARA 558.

4 It has been held, in relation to the rule against double portions, that both parents should nowadays be taken to be in loco parentis unless the contrary is proved: see *Re Cameron, Phillips v Cameron* [1999] Ch 386, [1999] 2 All ER 924; and PARA 244 note 1.

5 See *Re Roberts, Public Trustee v Roberts* [1946] Ch 1; cf *Worthington v Curtis* (1875) 1 ChD 419, CA (presumption of advancement rebutted). As to policies taken out on the lives of children see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 380; **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1051.

6 See *Re Webb, Barclays Bank Ltd v Webb* [1941] Ch 225, [1941] 1 All ER 321; *Re Foster's Policy, Menneer v Foster* [1966] 1 All ER 432, [1966] 1 WLR 222 (trust created); cf *Re Foster, Hudson v Foster* [1938] 3 All ER 357 (no trust created).

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## 247. Presumption of gift rebutted.

The presumption of advancement may be rebutted by showing that there was no present intention to benefit<sup>1</sup> or by a contemporaneous act or declaration by the alleged donor<sup>2</sup>, but acts or declarations by him subsequent to the purchase or transfer, if they are not so connected with it as to be reasonably regarded as contemporaneous, are not admissible in favour of the donor to rebut the presumption, subsequent acts and events being only admissible as evidence against the party who does or makes them and not in his favour<sup>3</sup>.

The business relationship of the parties may act as a rebuttal of the presumption of a gift, as, for instance, the fact that a son was solicitor to his parent<sup>4</sup>. A formal and unmistakable act of taking possession by the alleged donor at the time of the purchase would show his ownership and the trusteeship of the person in whose name the property has been purchased<sup>5</sup>. Subsequent declarations of the alleged donee might rebut the gift, as it is against his interest to make them<sup>6</sup>.

1 *Forrest v Forrest* (1865) 11 LT 763; *Marshall v Crutwell* (1875) LR 20 Eq 328. See also *Young v Sealey* [1949] Ch 278, [1949] 1 All ER 92; and PARA 242. It has been held that the court cannot receive evidence to show that an advancement was not intended, but that the real object was to defraud the revenue: *McEvoy v Belfast Banking Co Ltd* [1934] NI 67, CA; affd on other grounds [1935] AC 24, HL. See **EQUITY** vol 16(2) (Reissue) PARA 560. As to the admissibility of evidence of intention generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 1080. As to gifts promoting illegality see PARA 265.

2 *Stileman v Ashdown* (1742) 2 Atk 477; affd (1743) 2 Atk 608; *Murless v Franklin* (1818) 1 Swan 13; *Pranker v Pranker* (1820) 1 Sim & St 1; *Sidmouth v Sidmouth* (1840) 2 Beav 447; *Devoy v Devoy* (1857) 3 Sm & G 403; *Dumper v Dumper* (1862) 3 Giff 583; *Scawin v Scawin* (1841) 1 Y & C Ch Cas 65; *Stock v McAvoy* (1872) LR 15 Eq 55; *Hoyes v Kindersley* (1854) 2 Sm & G 195; *Bone v Pollard* (1857) 24 Beav 283; *Lloyd v Pughe* (1872) 8 Ch App 88; *Pilsworth v Mosse* (1862) 14 I Ch R 163; *Re Blakely Ordnance Co, Coates's Case* (1876) 46 LJCh 367; *Re Gooch, Gooch v Gooch* (1890) 62 LT 384; *Warren v Gurney* [1944] 2 All ER 472, CA.

3 *Shephard v Cartwright* [1955] AC 431, [1954] 3 All ER 649, HL, where a father procured the registration of shares in the names of his children but subsequently dealt with the shares, and with others which replaced them, for his own purposes. To do so he obtained the signatures of his children to documents, of the contents of which they were ignorant. It was held that no inference as to the father's intention at the time of the vesting of the shares in the children could be drawn from his later conduct. See also *Crabb v Crabb* (1834) 1 My & K 511 at 518; *Sidmouth v Sidmouth* (1840) 2 Beav 447; *Jeans v Cooke* (1857) 24 Beav 513; *Fox v Fox* (1863) 15 I Ch R 89; *Tucker v Burrow* (1865) 2 Hem & M 515 at 524; *O'Brien v Sheil* (1873) LR 7 Eq 255; *Forrest v Forrest* (1865) 11 LT 763; *Warren v Gurney* [1944] 2 All ER 472, CA; *Antoni v Antoni* [2007] UKPC 10, [2007] WTLR 1335, [2007] All ER (D) 335 (Feb).

4 *Garrett v Wilkinson* (1848) 2 De G & Sm 244.

5 *Stock v McAvoy* (1872) LR 15 Eq 55.

6 *Sidmouth v Sidmouth* (1840) 2 Beav 447; and cf *Redington v Redington* (1794) 3 Ridg Parl Rep 106 at 195, 197.

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## 248. Cumulative gifts.

Where the original purchase of stock in the name of another, or transfer of stock into that other's name, is a gift, subsequent repetition of that purchase or transfer is presumably also a gift<sup>1</sup>. Likewise in the case of a purchase of land with the aid of an instalment mortgage by a spouse or civil partner<sup>2</sup> in his spouse or civil partner's name to which the presumption of advancement<sup>3</sup> applies; where this is paid off by the purchasing spouse or civil partner over a period of years, the payment of each instalment is, as it were, a supplementary gift<sup>4</sup>. Where a donor by one deed gives annuities to certain persons, and by another deed gives annuities of different amounts to some of the same persons, the annuities are cumulative, though the donor may stand in loco parentis to some of the annuitants<sup>5</sup>.

1 *Fowkes v Pascoe* (1875) 10 Ch App 343, CA.

2 As to the implicit extension of caselaw dealing with financial arrangements between wives and husbands to civil partners see PARA 244 note 1.

3 See PARA 244.

4 *Moate v Moate* [1948] 2 All ER 486; *Silver v Silver* [1958] 1 All ER 523, [1958] 1 WLR 259, CA.

5 *Palmer v Newell* (1856) 8 De GM & G 74; and see **EQUITY** vol 16(2) (Reissue) PARA 744 et seq.

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## **(v) Acceptance and Disclaimer**

### **249. Presumption of acceptance.**

Express acceptance by the donee is not necessary to complete a gift. It has long been settled that the acceptance of a gift by the donee is to be presumed until his dissent is signified, even though he is not aware of the gift<sup>1</sup>. This is so even where the gift is of an onerous nature, or of what is called an 'onerous trust'<sup>2</sup>. The doctrine has been applied so as to defeat the Crown's title, which intervened between the execution of a voluntary assignment to a trustee and his knowledge of, and assent to, the deed<sup>3</sup>. So a transfer of stock to a person without his knowledge with intention to confer a benefit on him vests the property in him at once, and cannot afterwards be revoked by the donor even before the donee knows of the transfer<sup>4</sup>. Even a parent's<sup>5</sup> gift of such things as a watch, books or clothes to a child during minority cannot be recalled if given absolutely in the first instance<sup>6</sup>. The presumption of acceptance in these cases is artificial, but is founded on human nature: a person may be fairly presumed to assent to that to which he in all probability would assent if the opportunity of doing so were given to him<sup>7</sup>.

1 *Shep Touch* (7th Edn) 285. 'The law presumes that every grant is for the benefit of the grantee, and therefore, until the contrary is shown, supposes an agreement to the grant': *Butler and Baker's Case* (1591) 3 Co Rep 25a; *Thompson v Leach* (1690) 2 Vent 198 at 202; *Stirling v Vaughan* (1809) 11 East 619 at 623 per Lord Ellenborough. 'With respect to the necessity for showing the assent of the debtor [to the composition] I apprehend that it is contrary to the well-known principle of law, by which a benefit conferred upon a man is presumed to be accepted by him until the contrary is proved': *Cook v Lister* (1863) 13 CBNS 543 at 595 per Willes J. See also *Shephard v Cartwright* [1955] AC 431, [1954] 3 All ER 649, HL.

2 *Siggers v Evans* (1855) 5 E & B 367. The fact that the donee, while keeping and not repudiating the thing given, regards it as a loan does not prevent its being a gift: *Dewar v Dewar* [1975] 2 All ER 728, [1975] 1 WLR 1532, where, however, the conflicting decision of *Hill v Wilson* (1873) 8 Ch App 888, LJJ, was not cited; see PARA 201.



3 *Smith v Wheeler* (1671) 1 Vent 128 at 131; *Small v Marwood* (1829) 9 B & C 300 at 306.

4 *Standing v Bowring* (1885) 31 ChD 282, CA. An express trust which is completely constituted is generally binding and irrevocable unless a power of revocation is expressly reserved: see eg *New, Prance and Garrard's Trustee v Hunting* [1897] 2 QB 19, CA; affd sub nom *Sharp v Jackson* [1899] AC 419, HL; and see **TRUSTS** vol 48 (2007 Reissue) PARA 667. As to incomplete gifts see PARA 267 et seq.

5 It has been held, in relation to the rule against double portions, that both parents should nowadays be taken to be in loco parentis unless the contrary is proved: see *Re Cameron, Phillips v Cameron* [1999] Ch 386, [1999] 2 All ER 924; and PARA 244 note 1.

6 *Hunter v Westbrook* (1827) 2 C & P 578; *Smith v Smith* (1836) 7 C & P 401.

7 *London and County Banking Co v London and River Plate Bank* (1888) 21 QBD 535 at 542, CA; but see *Hill v Wilson* (1873) 8 Ch App 888 at 896, LJ.

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## **250. Disclaimer of gift.**

A person cannot be compelled to take what he does not desire to accept<sup>1</sup>. A donee, therefore, on becoming aware of the gift is entitled to repudiate it, and by doing so may not only disclaim all benefit, but will be relieved of all burdens or liabilities which the acceptance of the gift might have imposed on him<sup>2</sup>. A disclaimer of an attempt to make a gift inter vivos cannot be withdrawn<sup>3</sup>. However, a voluntary disclaimer of interests in the estate of a deceased person is not operative if executed before the death of the deceased and will not prevent the person making it from claiming under the will<sup>4</sup>.

Disclaimer by the original trustee of a voluntary trust which has been duly declared does not cause the trust to fail<sup>5</sup>.

1 *Thompson v Leach* (1690) 2 Vent 198; *Townson v Tickell* (1819) 3 B & Ald 31; *Re Stratton's Deed of Disclaimer, Stratton v IRC* [1958] Ch 42, [1957] 2 All ER 594, CA; *Re Gulbenkian's Settlement Trusts (No 2), Stephens v Maun* [1970] Ch 408, [1969] 2 All ER 1173. As to the right to disclaim assurances see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 74; *Re Wimperis, Wicken v Wilson* [1914] 1 Ch 502 at 507-508 (disclaimer of annuity, personal estate, given by will, donee having done nothing amounting to an acceptance of it; effectual since the Married Women's Property Act 1882).

2 *Mallott v Wilson* [1903] 2 Ch 494 at 501. As to acceptance by a minor see PARA 218.

3 *Re Paradise Motor Co Ltd* [1968] 2 All ER 625, [1968] 1 WLR 1125, CA.

4 See *Smith v Smith* [2001] 3 All ER 552, [2001] 1 WLR 1937.

5 See *Jones v Jones* (1874) 31 LT 535; *Mallott v Wilson* [1903] 2 Ch 494; and see further **TRUSTS** vol 48 (2007 Reissue) PARA 814.

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## **(6) CONDITIONS ATTACHED TO GIFTS**

### **251. Conditions precedent and subsequent.**

Gifts may be made subject to conditions either precedent or subsequent. A condition precedent is one to be performed before the gift takes effect<sup>1</sup>. A condition subsequent is one to be performed after the gift has taken effect, and, if the condition is unfulfilled, will put an end to the gift; but, if a condition subsequent is void, the gift remains good<sup>2</sup>. If the words of the condition are capable of being construed either as a condition precedent or as a condition subsequent but the words of the written instrument point to the inference that the donor intended the condition to be subsequent rather than precedent, the court will hold the condition to be subsequent<sup>3</sup>.

If a condition precedent is imposed on a gift to a minor, which can be, but is not, performed by him, the gift will not take effect; but if the condition is subsequent the minor will not lose the gift by his non-performance during minority<sup>4</sup>. Where a condition precedent attached to a gift is impossible of performance the gift will not take effect; but if a condition subsequent is impossible, the gift is absolute<sup>5</sup>. Similarly, although a gift with a condition subsequent that the donee should commit a crime is valid and the condition must be disregarded<sup>6</sup>, a gift to take effect on the performance of an illegal act is ineffectual, even though the act has been performed<sup>7</sup>.

1 See eg *Errington v Errington and Woods* [1952] 1 KB 290, [1952] 1 All ER 149, CA (gift of a house subject to a condition precedent).

2 *Egerton v Earl Brownlow* (1853) 4 HL Cas 1. See also *Ellis v Chief Adjudication Officer* [1998] 2 FCR 51, [1998] 1 FLR 184, CA (gift of a flat by a mother to her daughter, subject to the condition that the daughter pay off the mortgage and allow the mother to live in the flat for as long as it was reasonably practicable to do so, was not void for uncertainty; however, subsequent eviction of the mother by the daughter would make the condition unfulfilled and the gift would fail).

3 *Re Greenwood, Goodhart v Woodhead* [1903] 1 Ch 749 at 755, CA, per Sir Richard Henn Collins MR. In considering whether a condition is void for uncertainty, a stricter test is applied in the case of a condition subsequent than of a condition precedent: *Clayton v Ramsden* [1943] AC 320, [1943] 1 All ER 16, HL; *Re Allen, Faith v Allen* [1953] Ch 810, [1953] 2 All ER 898, CA; *Blathwayt v Baron Cawley* [1976] AC 397, [1975] 3 All ER 625, HL; *Re Tuck's Settlement Trusts, Public Trustee v Tuck* [1978] Ch 49, [1978] 1 All ER 1047, CA; *Re Tepper's Will Trusts, Kramer v Ruda* [1987] Ch 358, [1987] 1 All ER 970.

4 Co Litt 246b; *Bevan v Mahon-Hagan* (1892) 27 LR Ir 399; *Partridge v Partridge* [1894] 1 Ch 351; *Re Edwards, Lloyd v Boyes* [1910] 1 Ch 541. The usual conditions subsequent discussed in the authorities are obligations to reside or to take a name and arms, and a minor in the eyes of the law cannot refuse or neglect to perform the obligations; but where a lady gave her servants some lottery tickets, subject to a condition that if any of them won a prize half was to go to her daughter, it was held that one-half of the prize won by a servant who was a minor must go to the daughter: *Scot v Houghton and Fuller* (1706) 2 Vern 560.

5 Co Litt 206a; *Re Greenwood, Goodhart v Woodhead* [1903] 1 Ch 749, CA; *Re Croxon, Croxon v Ferrers* [1904] 1 Ch 252 (these are cases of wills, but the same principles apply); *Peyton v Bury* (1731) 2 P Wms 626; on appeal sub nom *Painton v Berry etc (Administrators of Thornton)* (1732) Kel W 37. A condition may be expressed with relation to some matters which are of such a nature that there is no condition at all unless those matters exist: *Yates v University College, London* (1873) 8 Ch App 454 at 461 per Lord Selborne LC; on appeal (1875) LR 7 HL 438.

6 Co Litt 206b.

7 Shep Touch (7th Edn) 129. Compare gifts of personalty by will, where in regard to conditions precedent a distinction is drawn between what is *malum in se* and what is only *malum prohibitum*: see *Re Elliott, Lloyds Bank v Burton-on-Trent Hospital Management Committee* [1952] Ch 217, [1952] 1 All ER 145; and **CHARITIES** vol 8 (2010) PARA 61; **WILLS** vol 50 (2005 Reissue) PARA 421. It was held in *Re Hepplewhite's Will Trusts* (1977) Times, 21 January, that where a testator leaves a gift of personalty subject to several conditions precedent, some of which are valid and some invalid as contrary to public policy, the valid conditions are separable from the others and the gift is good subject thereto but disregarding the invalid conditions, presumably only where they involve *malum prohibitum*.

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## **252. Gift to intended spouse or civil partner.**

The gift of an engagement ring is presumed to be absolute, but this presumption may be rebutted by proof that the ring was given on the express or implied condition that it should be returned if for any reason the marriage did not take place<sup>1</sup>. However, a party to an agreement to marry or a civil partnership agreement<sup>2</sup> who makes a gift of property to the other party to the agreement on the express or implied condition that it is to be returned if the agreement is terminated is not prevented from recovering the property by reason only of his having terminated the agreement<sup>3</sup>.

There is no particular principle of law applicable to wedding presents or presents relating to the registration of civil partnerships so as to make them joint gifts to both spouses or civil partners; where there is evidence of intention on the part of the donor such a gift may be found to have been given either to one party or to the other, or to both, but where no intention is clear the inference may be drawn that gifts originating from each party's family and friends were intended for that party<sup>4</sup>. The nature of the gift may supply evidence of the donor's intention<sup>5</sup>.

1 See the Law Reform (Miscellaneous Provisions) Act 1970 s 3(2) (reversing the presumption that engagement rings are conditional gifts (see *Jacobs v Davis* [1917] 2 KB 532)); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 253.

2 As to the meaning of 'civil partnership agreement' see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 16.

3 See the Law Reform (Miscellaneous Provisions) Act 1970 s 3(1); the Civil Partnership Act 2004 s 74(5); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 253. The action for breach of promise of marriage was abolished by the Law Reform (Miscellaneous Provisions) Act 1970 s 1, and corresponding provision to the effect that an agreement between two persons to register as civil partners of each other does not have effect as a contract giving rise to legal rights and that therefore no action lies in England and Wales for breach of such an agreement, is made by the Civil Partnership Act 2004 s 73: see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 16. The effect of these provisions is that the allocation of fault for breach of the agreement is of no legal significance and as a corollary, the law relating to the return of gifts conditional on marriage or civil partnership does not depend, as it did in the past, on responsibility for breaking the engagement or agreement. The law relating to matrimonial and civil partnership property is applied by the Law Reform (Miscellaneous Provisions) Act 1970 s 2 and the Civil Partnership Act 2004 s 74 to property disputes between parties who have broken off their engagement or agreement: see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 230.

4 *Samson v Samson* [1960] 1 All ER 653, [1960] 1 WLR 190, CA, applying dictum of Lord Goddard in *Hichens v Hichens* [1945] P 23 at 26, [1945] 1 All ER 451 at 453, CA.

5 *M'Donald v M'Donald* 1953 SLT (Sh Ct) 36. See also *Re Jamieson, ex p Pannell* (1889) 60 LT 159.

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## **253. Repugnant conditions.**

Where there is an absolute gift of real or personal property and a condition is attached which is inconsistent with and repugnant to the gift, the condition is wholly void and the donee takes the gift free from the condition<sup>1</sup>.

1 *Bradley v Peixoto* (1797) 3 Ves 324; *Byng v Lord Strafford* (1843) 5 Beav 558 at 567; *Watkins v Williams* (1851) 3 Mac & G 622; *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 181 per Lord Truro; *Re Cockerill, Mackaness v Percival* [1929] 2 Ch 131. The same rule applies if the condition is that the donee commit a crime: Co Litt 206b. Repugnant conditions are further discussed in **CHARITIES** vol 8 (2010) PARA 136; **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1268; **REAL PROPERTY** vol 39(2) (Reissue) PARA 99; **WILLS** vol 50 (2005 Reissue) PARA 419 et seq.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(6) CONDITIONS ATTACHED TO GIFTS/254. Restraint on alienation.

## 254. Restraint on alienation.

Although any restraint on alienation of an absolute interest in possession during a certain period is bad<sup>1</sup>, a condition that the donee shall not alienate a reversionary interest appears to be good<sup>2</sup>, as is a condition that the donee shall not alienate to a particular person or class of persons<sup>3</sup>. A restraint on alienation to anyone other than one person<sup>4</sup>, or to anyone other than one or more of a small and diminishing class of persons<sup>5</sup>, is bad; but a restraint on alienation to anyone other than one or more of a small class which is likely to increase is good<sup>6</sup>. One property can be given on condition that another is not alienated, for such a gift does not interfere with the donee's power to alienate the property given, and so there is no repugnancy<sup>7</sup>.

Where a gift is absolute in the first instance, a restraint on the power of leasing is void on the same principle as is a restraint on alienation<sup>8</sup>. After an absolute gift a proviso of forfeiture on bankruptcy or alienation is void<sup>9</sup>, but a gift of income may be made upon trust for a person until attempted alienation or bankruptcy and thereafter on other trusts<sup>10</sup>, or on protective trusts for his benefit<sup>11</sup>. In the case of a gift by will, a gift over of what the donee of an absolute interest in the corpus or income does not dispose of is void<sup>12</sup>, and it seems that the same principle applies to gifts by deed or instrument in writing inter vivos.

The test is that an incident of the estate given, which the donor cannot directly take away or prevent, cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, nor by a conditional limitation which would cause it to shift to another person<sup>13</sup>. The foregoing rule applies also where the subject of the gift is for life only<sup>14</sup>.

1 *Renaud v Tourangeau* (1867) LR 2 PC 4; *Re Rosher, Rosher v Rosher* (1884) 26 ChD 801; but see *Kearsley v Woodcock* (1843) 3 Hare 185.

2 *Churchill v Marks* (1844) 1 Coll 441; *Re Payne* (1858) 25 Beav 556; *Re Porter, Coulson v Capper* [1892] 3 Ch 481.

3 Co Litt 223a; *Re Macleay* (1875) LR 20 Eq 186; *Re Rosher, Rosher v Rosher* (1884) 26 ChD 801.

4 *Muschamp v Bluet* (1617) J Bridg 132.

5 *Attwater v Attwater* (1853) 18 Beav 330; *Re Brown, District Bank Ltd v Brown* [1954] Ch 39, [1953] 2 All ER 1342. See also *Crofts v Beamish* [1905] 2 IR 349, CA, where a condition, restricting alienation except to the devisee's brothers at a price to be determined by arbitration in the event of disagreement, was held to be repugnant and void.

6 *Re Macleay* (1875) LR 20 Eq 186.

7 Co Litt 223a; *Caldy Manor Estate Ltd v Farrell* [1974] 3 All ER 753, [1974] 1 WLR 1303, CA, where a covenant given on the purchase of land not to sell it separately from the purchaser's adjoining land was held not to be void. If a covenant against alienation were broken, the covenantee would have no more than a right to damages, but he might obtain an injunction to restrain a threatened alienation: *Caldy Manor Estate Ltd v Farrell* at 756 and at 1307.

8 *Re Rosher, Rosher v Rosher* (1884) 26 ChD 801.

9 *Brandon v Robinson* (1811) 18 Ves 429; *Re Machu* (1882) 21 ChD 838; *Re Dugdale, Dugdale v Dugdale* (1888) 38 ChD 176; *Corbett v Corbett* (1888) 14 PD 7, CA; *Metcalfe v Metcalfe* (1889) 43 ChD 633; affd [1891] 3 Ch 1, CA. See also **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 405 et seq.

10 *Brandon v Robinson* (1811) 18 Ves 429.

11 See the Trustee Act 1925 s 33; and **SETTLEMENTS** vol 42 (Reissue) PARAS 917-919.

12 See eg *Watkins v Williams, Haverd v Church* (1851) 3 Mac & G 622; and **WILLS** vol 50 (2005 Reissue) PARA 665.

13 *Re Dugdale, Dugdale v Dugdale* (1888) 38 ChD 176 at 182.

14 *Brandon v Robinson* (1811) 18 Ves 429; *Metcalfe v Metcalfe* (1889) 43 ChD 633.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(6) CONDITIONS ATTACHED TO GIFTS/255. Restraint of marriage or civil partnership.

## 255. Restraint of marriage or civil partnership.

Prima facie a condition in total restraint of marriage or civil partnership<sup>1</sup> is void, although the real question is whether the donor intended to discourage a marriage or civil partnership<sup>2</sup>. If the intention is to provide for a person while he or she is single or to benefit the object in whose favour the gift over is made, and not to restrain marriage or civil partnership or 'compel' celibacy, it is effective<sup>3</sup>.

A condition in partial restraint of marriage or civil partnership is good, but in the case of personal estate, unless there is a gift over on, or the gift is so made that it is revoked by, the marriage or civil partnership, it is treated as a mere idle threat<sup>4</sup> and invalid<sup>5</sup>.

1 Although decisions cited in notes 2-5 pre-date the concept of civil partnerships, the Civil Partnership Act 2004 confers rights on civil partners in all practicable respects, and particularly in relation to financial matters, analogous to those enjoyed by married persons and decisions which on their facts relate only to marriage must be read in the light of this. As to the legal incidents of marriage and civil partnership generally see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 203 et seq.

2 *Morley v Rennoldson, Morley v Linkson* (1843) 2 Hare 570, 574; *Re Bellamy, Pickard v Holroyd* (1883) 48 LT 212; *Re Hewett, Eldridge v Iles* [1918] 1 Ch 458. The rules of construction are the same whether the instrument in question is a deed or a will: see *Re Whiting's Settlement, Whiting v De Rutzen* [1905] 1 Ch 96, CA; *Re Hewett, Eldridge v Iles*. See also **CONTRACT** vol 9(1) (Reissue) PARA 862.

3 See note 2.

4 *le in terrorem*.

5 *Gillet v Wray* (1715) 1 P Wms 284; *Re Nourse, Hampton v Nourse* [1899] 1 Ch 63; *Re Whiting's Settlement, Whiting v De Rutzen* [1905] 1 Ch 96, CA; *Re Hanlon, Heads v Hanlon* [1933] Ch 254. So a gift subject to a condition that a man or woman shall not remarry (or, presumably, enter into a subsequent civil partnership) is good: *Newton v Marsden* (1862) 2 John & H 356; *Allen v Jackson* (1875) 1 ChD 399, CA; and see **SETTLEMENTS** vol 42 (Reissue) PARA 936; **WILLS** vol 50 (2005 Reissue) PARA 419 et seq.

It has been held that a condition in partial restraint of marriage is made, in the ordinary case, in the expectation that a woman who marries will be maintained by her husband: see *Jones v Jones* (1876) 1 QBD 279 (the rule as to realty being founded on the common law of England, and that as to personalty on the civil law): *quaere*, however, the continuing significance of this decision.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(6) CONDITIONS ATTACHED TO GIFTS/256. Gifts inducing separation of spouses or civil partners.

## **256. Gifts inducing separation of spouses or civil partners.**

A gift to induce a person to live apart from their spouse or civil partner<sup>1</sup> is bad<sup>2</sup>, but a gift for maintenance of a spouse or civil partner during desertion by their spouse or civil partner is good<sup>3</sup>. In the latter case it is a provision by way of limitation, and not of condition. A gift by post-nuptial settlement, or by a settlement made during the subsistence of a civil partnership<sup>4</sup>, to a spouse or civil partner during cohabitation is good<sup>5</sup>.

1 Although decisions cited in notes 2-5 pre-date the concept of civil partnerships, the Civil Partnership Act 2004 confers rights on civil partners in all practicable respects, and particularly in relation to financial matters, analogous to those enjoyed by married persons and decisions which on their facts relate only to marriage must be read in the light of this. As to the legal incidents of marriage and civil partnership generally see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 203 et seq.

2 *Re Moore, Trafford v Maconochie* (1888) 39 ChD 116, CA; *Re Caborne, Hodge and Nabarro v Smith* [1943] Ch 224, [1943] 2 All ER 7; *Re Johnson's Will Trusts, National Provincial Bank Ltd v Jeffrey* [1967] Ch 387, [1967] 1 All ER 553. As to agreement for future separation see also **CONTRACT** vol 9(1) (Reissue) PARA 864.

3 *Re Charleton, Bracey v Sherwin* (1911) 55 Sol Jo 330; *Re Lovell, Sparks v Southall* [1920] 1 Ch 122; *Re Thompson, Lloyds Bank Ltd v George* [1939] 1 All ER 681. These are cases of testamentary gifts, but the same principles apply to gifts inter vivos. See further **WILLS** vol 50 (2005 Reissue) PARA 422.

4 As to post-nuptial settlements and settlements made during the subsistence of a civil partnership see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 711.

5 *Re Hope Johnstone, Hope Johnstone v Hope Johnstone* [1904] 1 Ch 470.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(7) REVOCATION AND AVOIDANCE OF GIFTS/257. Gifts prima facie irrevocable.

## **(7) REVOCATION AND AVOIDANCE OF GIFTS**

### **257. Gifts prima facie irrevocable.**

Prima facie the donor of a completed gift is not entitled to revoke it nor to recall any payment made voluntarily<sup>1</sup>. Where an instrument is formally executed as a deed and delivered and there is nothing but the retention of the deed in the possession of the executing party to qualify the delivery, and nothing to show that he did not intend it to operate immediately, it is a valid and effectual deed, and delivery to the party who is to take under it or to any person for his use is not essential. Even though the contents have not been communicated to the beneficiaries, such a deed cannot be revoked unless a power of revocation is reserved<sup>2</sup>. If a voluntary deed is complete, in good faith and valid, and is unaffected by any statutory disability, it is indistinguishable from one executed for valuable consideration, and it carries with it all the same incidents and rights attached to the property<sup>3</sup>. With yet stronger reason, delivery to a third person for the use of the beneficiary in whose favour the deed is made, where the grantor parts with all control of the deed, makes the deed effectual from the instant of the delivery<sup>4</sup>.

A gift of a reversionary interest is irrevocable, even though no notice has been given to the trustees in whose names the reversionary interest is vested, nor to the trustees of or

beneficiaries under the voluntary deed<sup>5</sup>. On the same principle, where there are successive voluntary deeds, the first takes effect, even though it is retained by the donor or settlor<sup>6</sup>.

1 *Villers v Beaumont* (1682) 1 Vern 100; *Mackintosh v Stuart* (1864) 36 Beav 21; *Slater v Burnley Corp* (1888) 59 LT 636. So that where the heir voluntarily paid the deceased's funeral expenses, meaning to bear them himself, but afterwards changed his mind, he was not allowed to recover them from the personal representative: *Coleby v Coleby* (1866) LR 2 Eq 803. Once a trust has been duly established it is generally binding and irrevocable unless a power of revocation has been expressly reserved: see eg *Fortescue v Barnett* (1834) 3 My & K 36, where the owner of a policy assigned it to trustees, but kept the policy in his own possession, gave no notice to the assurance office and subsequently surrendered the policy for valuable consideration; it was held to be a complete gift and the owner was bound to give a security to the value of the surrendered policy. See further **TRUSTS** vol 48 (2007 Reissue) PARA 659 et seq. As to ademption of legacies by portions see **EQUITY** vol 16(2) (Reissue) PARA 739 et seq; **WILLS** vol 50 (2005 Reissue) PARA 445 et seq; and as to bringing advances into hotchpot on the distribution of an intestate's estate see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 605 et seq.

2 *Boughton v Boughton* (1739) 1 Atk 625; *Doe d Garnons v Knight* (1826) 5 B & C 671; *Bill v Cureton* (1835) 2 My & K 503 (where a single woman made a settlement not in contemplation of marriage, and it was held that it could not be revoked); *Fletcher v Fletcher* (1844) 4 Hare 67; *Hope v Harman* (1847) 11 Jur 1097; *Xenos v Wickham* (1866) LR 2 HL 296. See also **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 31.

3 *Dickinson v Burrell, Stourton v Burrell* (1866) LR 1 Eq 337 at 343 per Lord Romilly MR. In *Hall v Hall* (1873) 8 Ch App 430 at 437, James LJ said 'The law of this land permits anyone to dispose of his property gratuitously', and 'to select his own attorney to advise him'. In that case the Court of Appeal in Chancery refused to set aside a voluntary deed, although no power of revocation was reserved, but the courts will not order specific performance of a voluntary covenant: *Colman v Sarrel* (1789) 1 Ves 50 at 55; and see **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 805.

4 *Doe d Garnons v Knight* (1826) 5 B & C 671.

5 *Re Way's Trusts* (1864) 2 De GJ & Sm 365; and see *Donaldson v Donaldson* (1854) Kay 711.

6 *Clavering v Clavering* (1704) 2 Vern 473; affd (1705) 7 Bro Parl Cas 410, HL.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(7) REVOCATION AND AVOIDANCE OF GIFTS/258. Creditors' deeds.

## 258. Creditors' deeds.

A deed executed in favour of creditors who are not parties or privy to it is revocable by the debtor at any time before the creditors have assented to it<sup>1</sup>. The principle on which this doctrine is founded is that, in executing the creditors' deed, the debtor has no intention to create a perfect trust for the benefit of his creditors, but desires to make an arrangement for his own personal convenience for payment of his debts in an order prescribed by himself and over which he retains control<sup>2</sup>. The principle, therefore, does not conflict with the cases<sup>3</sup> which establish that a trust perfectly created in favour of a volunteer cannot afterwards be revoked.

If, however, a creditor is a party or privy to the deed<sup>4</sup>, or the trustee of the creditors' deed takes a beneficial as well as a legal interest under it<sup>5</sup>, the deed cannot be revoked. The same rule applies, even though the creditor is not a party to the deed, if he has notice given to him by or through the debtor of its existence, by being expressly or impliedly told that he may look to the trust property for payment of his demand. In such case he becomes a beneficiary<sup>6</sup>.

The trust is irrevocable if created for the purpose of repairing breaches of trust or if the surrounding circumstances show an intention to create the relation of trustee and beneficiary<sup>7</sup>. It is also irrevocable after the death of the settlor or of one of the settlors<sup>8</sup>, or if its provisions are not to take effect until after the settlor's death<sup>9</sup>.

1 *Garrard v Lord Lauderdale* (1830) 3 Sim 1; affd (1831) 2 Russ & M 451; *Law v Bagwell, Evans v Bagwell* (1843) 4 Dr & War 398; *Browne v Cavendish, Cavendish v Browne* (1844) 1 Jo & Lat 606; *Johns v James* (1878) 8 ChD 744, CA; *Henderson v Rothschild* (1886) 33 ChD 459; affd (1887) 56 LJCh 471, CA; and see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 861.

2 *Garrard v Lord Lauderdale* (1830) 3 Sim 1 at 6; affd (1831) 2 Russ & M 451; *Bill v Cureton* (1835) 2 My & K 503.

3 See eg *Ellison v Ellison* (1802) 6 Ves 656; *Pulvertoft v Pulvertoft* (1811) 18 Ves 84 at 99; *Paul v Paul* (1882) 20 ChD 742, CA.

4 *Acton v Woodgate* (1833) 2 My & K 492; *Synnot v Simpson* (1854) 5 HL Cas 121; *Montefiore v Browne* (1858) 7 HL Cas 241; *Johns v James* (1878) 8 ChD 744, CA. The assent of one creditor is sufficient to render the deed irrevocable (*Harland v Binks* (1850) 15 QB 713), but, if there is no communication of its execution to any creditor, it is revocable even if executed in pursuance of a previous bargain or in pursuance of a resolution passed at a meeting of the creditors (*Ellis & Co v Cross* [1915] 2 KB 654).

5 *Siggers v Evans* (1855) 5 E & B 367.

6 *Synnot v Simpson* (1854) 5 HL Cas 121. As to deeds of arrangement generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 859 et seq.

7 *New, Prance and Garrard's Trustee v Hunting* [1897] 2 QB 19, CA; *Priestley v Ellis* [1897] 1 Ch 489; *Radcliffe v Abbey Road and St John's Wood Permanent Building Society* (1918) 87 LJCh 557.

8 *Synnot v Simpson* (1854) 5 HL Cas 121; *Priestley v Ellis* [1897] 1 Ch 489.

9 *Re Fitzgerald's Settlement, Fitzgerald v White* (1887) 37 ChD 18, CA.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(7) REVOCATION AND AVOIDANCE OF GIFTS/259. Fraud and undue influence.

## 259. Fraud and undue influence.

Donors, even though of full age and capacity, are entitled to set aside their gifts if induced by fraud, coercion or undue influence<sup>1</sup>, for the donee must not profit by his own wrong, nor must the influence arising from relations existing between parties be abused<sup>2</sup>. Where there is a relationship of trust and confidence, and inexplicably large gifts are made, the presumption of undue influence will be rebuttable only by proof of full, free and informed thought on the part of the donor<sup>3</sup>.

The equitable doctrine relating to unconscionable bargains does not apply to gifts<sup>4</sup>.

1 These subjects are fully discussed elsewhere in this work: see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 701 et seq; **EQUITY** vol 16(2) (Reissue) PARA 416 et seq.

2 *Bridgman v Green* (1755) 2 Ves Sen 627; *Norton v Relly* (1764) 2 Eden 286; *Nottidge v Prince* (1860) 2 Giff 246; *Whyte v Meade* (1840) 2 I Eq R 420; *Allcard v Skinner* (1887) 36 ChD 145 at 171, CA. As to undue influence see **EQUITY** vol 16(2) (Reissue) PARA 417 et seq.

3 *Re Craig, Meneces v Middleton* [1971] Ch 95, [1970] 2 All ER 390. The court may authorise a gift of a mentally disordered person's property even where undue influence is presumed and not rebutted, if satisfied that the gift was one which the person might have been expected to make if no longer mentally disordered and removed from the undue influence: *Re CMG* [1970] Ch 574, [1970] 2 All ER 740n, Ct of Protection (decided under the Mental Health Act 1959 s 103(1)(d) (repealed): for the court's powers in this respect see now the Mental Capacity Act 2005 s 18; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 759). However, even where a donee proves that a gift was made by a donor after full, free and informed thought, a court may set it aside on the ground of public policy to prevent the donee benefiting from undue influence in a relationship of trust and confidence: *Hammond v Osborn* [2002] EWCA Civ 885, [2002] 2 P & CR D41, [2002] All ER (D) 232 (Jun). See also *Roche v Sheerington* [1982] 2 All ER 426, [1982] 1 WLR 599. For a case where elderly patients in a nursing



home whose mental capacity had failed were entitled to summary judgment to recover money given to the defendant, who ran the nursing home, see *Mark v Ayrey* [2002] All ER (D) 426 (Jul).

4 *Langton v Langton* [1995] 3 FCR 521, [1995] 2 FLR 890, where, however, the gift was set aside on the ground of undue influence.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(7) REVOCATION AND AVOIDANCE OF GIFTS/260. Fraudulent transactions in land and transactions intended to defeat family claims.

## **260. Fraudulent transactions in land and transactions intended to defeat family claims.**

A voluntary disposition of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchaser<sup>1</sup>.

The court may also impeach gifts made with the intention of defeating a claim for financial relief in a matrimonial or civil partnership cause or pursuant to a claim of failure to maintain during the subsistence of a marriage or civil partnership<sup>2</sup>, and gifts made with the intention of defeating an application for an order<sup>3</sup> that the will of a deceased person fails to make reasonable financial provision for the family members making the application<sup>4</sup>.

1 See the Law of Property Act 1925 s 173(1); and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 868.

2 See the Matrimonial Causes Act 1973 s 37; the Matrimonial and Family Proceedings Act 1984 s 23; the Civil Partnership Act 2004 Sch 5 paras 74, 75, Sch 7 paras 15, 16; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARAS 586-588.

3 I.e. an order under the Inheritance (Provision for Family and Dependents) Act 1975 s 2 (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 691-692).

4 See the Inheritance (Provision for Family and Dependents) Act 1975 s 10(2); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 686 et seq.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(7) REVOCATION AND AVOIDANCE OF GIFTS/261. Mistake and misrepresentation.

## **261. Mistake and misrepresentation.**

Although a gift may be set aside on the ground of mistake<sup>1</sup> alone, where there is no fraud or undue influence, and no mistake has been induced by those who derive benefit under the gift, the mistake must be of a very serious character to induce the court to order the donee to restore the gift<sup>2</sup>.

Where a gift has been induced by an innocent misrepresentation of fact by the donee, the donor has the right in equity to recover the gift<sup>3</sup>. If the gift is made under the influence of a delusion relating to matters spiritual or temporal, the right to set it aside is clear<sup>4</sup>.

Imperfect knowledge on the donor's part of the effect of the instrument making the gift is a ground for setting aside the gift<sup>5</sup>.

1 As to rights arising from mistake see **MISTAKE** vol 77 (2010) PARA 1 et seq.

2 *Ogilvie v Littleboy* (1897) 13 TLR 399, CA; affd sub nom *Ogilvie v Allen* (1899) 15 TLR 294, HL. Forgetfulness has been regarded as 'mistake' for these purposes (*Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476, preferring the judgments of Kay and Lopes LJ in *Barrow v Isaacs & Son* [1891] 1 QB 417, CA, to that of Lord Esher MR in the same case; cf *Kelly v Solari* (1841) 9 M & W 54; *Brownlie v Campbell* (1880) 5 App Cas 925 at 952, HL; and *Re Ellis's Settlement, Ellis v Ellis* [1909] 1 Ch 618), as has the transferring of property for reasons of lawful inheritance tax planning by a person unaware that he was terminally ill (*Re Griffiths (deceased); Ogden v Trustees of the RHS Griffiths 2003 Settlement*) [2008] EWHC 118 (Ch), [2009] Ch 162, [2008] 2 All ER 654). Where in a settlement the settlor did not intend to make an irrevocable gift (in default of issue) to volunteers, it was held that the gift was void against the settlor: *Wollaston v Tribe* (1869) LR 9 Eq 44.

3 *Re Glubb, Bamfield v Rogers* [1900] 1 Ch 354, CA (dissenting from *Wilson v Thornbury* (1875) 10 Ch App 239); but equitable defences may arise (see **EQUITY** vol 16(2) (Reissue) PARAS 414, 901 et seq), or the remedy of rescission may be unavailable (see the Misrepresentation Act 1967 s 1; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 704, 817).

4 *Nottidge v Prince* (1860) 2 Giff 246.

5 See *Howard v Fingall* (1853) 22 LTOS 12. As to the setting aside of a voluntary settlement, where its effect is not properly understood by the settlor, see **EQUITY** vol 16(2) (Reissue) PARA 439; **SETTLEMENTS** vol 42 (Reissue) PARAS 616, 618. As to the requirement of sufficient knowledge for competency to make gifts see PARA 204.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(7) REVOCATION AND AVOIDANCE OF GIFTS/262. Transactions avoided in bankruptcy and by creditors.

## 262. Transactions avoided in bankruptcy and by creditors.

Where an individual is adjudged bankrupt and he has at a relevant time<sup>1</sup> entered into a transaction with any person at an undervalue, the trustee of the bankrupt's estate may apply to the court for such order as the court thinks fit for restoring the position to what it would have been if that individual had not entered into the transaction<sup>2</sup>. For these purposes an individual enters into a transaction with a person at an undervalue if he makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for him to receive no consideration<sup>3</sup>.

There are further provisions<sup>4</sup> relating to transactions entered into at an undervalue<sup>5</sup> which are not restricted to transactions taking place within a certain period and which apply whether or not insolvency proceedings have been taken. These further provisions, however, only apply if the court<sup>6</sup> is satisfied that the transaction was entered into by the person entering into it for the purpose of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him or of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make<sup>7</sup>. Where those further provisions apply, the court may make such order as it thinks fit for restoring the position to what it would have been if the transaction had not been entered into, and protecting the interests of persons who are victims<sup>8</sup> of the transaction<sup>9</sup>. An application for an order under these provisions can only be made:

- 10 (1) in a case where the person entering into the transaction at an undervalue has been adjudged bankrupt, by the official receiver, by the trustee of the bankrupt's estate, or (with the leave of the court) by a victim of the transaction<sup>10</sup>;
- 11 (2) in a case where a victim of the transaction is bound by a voluntary arrangement<sup>11</sup>, by the supervisor of the voluntary arrangement or by any person who (whether or not so bound) is such a victim<sup>12</sup>; or
- 12 (3) in any other case, by a victim of the transaction<sup>13</sup>.

and an application so made is to be treated as made on behalf of every victim of the transaction<sup>14</sup>.

1 The time at which an individual enters into a transaction at an undervalue is a relevant time if the transaction is entered into at a time in the period of five years ending with the day of the presentation of the bankruptcy petition on which the individual is adjudged bankrupt: see the Insolvency Act 1986 s 341(1)(a); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 660. However, if the time is two years or more before the end of that period, it is not a relevant time unless the individual was insolvent at that time or became insolvent in consequence of the transaction, although these requirements are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by an individual with a person who is an associate of his (otherwise than by reason only of being his employee): see s 341(2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 660. For these purposes an individual is insolvent if he is unable to pay his debts as they fall due, or the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities: see s 341(3); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 660. As to 'associate' see s 435; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 660.

2 See the Insolvency Act 1986 s 339(1), (2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 655. Without prejudice to the generality of s 339(2), s 342 sets out particular orders that the court may make: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 661-662.

The Married Women's Property Act 1882 s 10 provides that nothing therein contained gives validity as against creditors of the husband to any gift, by a husband to his wife, of any property which continues to be in the order and disposition or reputed ownership of the husband: however, this provision is of little modern significance. See also *French v Gething* [1921] 3 KB 280; *affd* [1922] 1 KB 236, CA.

3 See the Insolvency Act 1986 s 339(3)(a); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 654. He also enters into a transaction with a person at an undervalue if he enters into a transaction with that person in consideration of marriage or the formation of a civil partnership, or for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual: see s 339(3)(b), (c); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 654. See eg *Re Kumar (a bankrupt), ex p Lewis v Kumar* [1993] 2 All ER 700, [1993] 1 WLR 224; *Agricultural Mortgage Corp'n plc v Woodward* [1996] 2 FCR 796, [1995] 1 BCLC 1, CA.

4 See the Insolvency Act 1986 ss 423, 424; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 664 et seq.

5 Defined for the purposes of the Insolvency Act 1986 s 423(1) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 664) in very slightly different language but to the same effect as in s 339(3): see note 3.

6 I.e. the High Court or any other court which would have jurisdiction in relation to a bankruptcy petition relating to the person entering into the transaction: see the Insolvency Act 1986 s 423(4); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 664.

7 See the Insolvency Act 1986 s 423(3); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 664.

8 I.e. persons who are, or are capable of being, prejudiced by the transaction: see the Insolvency Act 1986 s 423(5); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 664.

9 See the Insolvency Act 1986 s 423(2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 664. Without prejudice to the generality of s 423, s 425 sets out particular orders that the court may make: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 666.

10 See the Insolvency Act 1986 s 424(1)(a); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 665.

11 I.e. one approved under the Insolvency Act 1986 Pt VIII (ss 252-263): see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 81 et seq.

12 See the Insolvency Act 1986 s 424(1)(b); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 665.

13 See the Insolvency Act 1986 s 424(1)(c); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 665.

14 See the Insolvency Act 1986 s 424(2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 665.

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## **(8) ILLEGALITY**

### **263. Gifts for illegal purposes.**

A gift for an illegal purpose may expose the offender to the criminal law, such as a gift to bribe a judge or relating to the nomination or appointment to or resignation of a public office<sup>1</sup>, or a gift to a member, officer or servant of a public body on account of doing or forbearing to do anything in respect of any matter in which that public body is concerned<sup>2</sup>, or a gift to procure the grant of a dignity or title of honour<sup>3</sup>, or a gift to a voter (including treating) at or in connection with an election<sup>4</sup>, or a gift to an agent as an inducement or reward for doing or not doing any act in relation to his principal's affairs or for showing or not showing favour or disfavour to any person in relation thereto<sup>5</sup>, or a gift by a person adjudged bankrupt made with an intent to defraud creditors<sup>6</sup>. There are restrictions on the importation and exportation of gifts<sup>7</sup>, and contravention of those restrictions involves the forfeiture of the gift and renders the exporter or his agent or the shipper of the gift liable to penalties<sup>8</sup>.

1 See the Sale of Offices Act 1809 s 4; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 535.

2 See the Public Bodies Corrupt Practices Act 1889 s 1; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 529.

3 See the Honours (Prevention of Abuses) Act 1925 s 1; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 531.

4 See **ELECTIONS AND REFERENDUMS** vol 15(4) (2007 Reissue) PARA 707 et seq.

5 See the Prevention of Corruption Act 1906 s 1; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 321.

6 See the Insolvency Act 1986 s 357; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 717. It is a defence for the bankrupt to prove that, at the time of the conduct constituting the offence, he had no intent to defraud or to conceal the state of his affairs: see s 352; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 717.

7 See the Import, Export and Customs Powers (Defence) Act 1939 s 1; the Export Control Act 2002 ss 1, 5; and **TRADE AND INDUSTRY** vol 97 (2010) PARA 808 et seq. HM Customs may allow the importation of goods if they are unsolicited gifts, but such gifts may attract duty: see *R v Weitzner* (1952) Times, 7 March, CCA.

8 See the Import, Export and Customs Powers (Defence) Act 1939 s 3; the Export Control Act 2002 ss 1, 7; and **TRADE AND INDUSTRY** vol 97 (2010) PARA 808 et seq.

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### **264. Tainted gifts.**

When a confiscation order is made<sup>1</sup>, for the purposes of deciding the recoverable amount the 'available amount' includes the total of the values, at that time, of all tainted gifts<sup>2</sup>. Where the defendant or a receiver<sup>3</sup> applies to the Crown Court to vary a confiscation order, the court may, in calculating the available amount, disregard any inadequacy which it believes is attributable, wholly or partly, to anything done by the defendant for the purpose of preserving property held by the recipient of a tainted gift<sup>4</sup> from any risk of realisation under the applicable provisions<sup>5</sup>.

Where a restraint order is made<sup>6</sup>, and a management receiver is appointed<sup>7</sup>, the court may order a person holding an interest in realisable property to which the restraint order applies to make to the receiver such payment as the court specifies in respect of a beneficial interest held by the recipient of a tainted gift and may, on the payment being made, by order transfer, grant or extinguish any interest in the property<sup>8</sup>.

Whether or not a court has decided that the defendant has a criminal lifestyle<sup>9</sup>, a gift is 'tainted' for these purposes if it was made by the defendant<sup>10</sup> at any time after the relevant day<sup>11</sup> and was of property:

- 13 (1) which was obtained by the defendant as a result of or in connection with his general criminal conduct<sup>12</sup>; or
- 14 (2) which, in whole or part and whether directly or indirectly, represented in the defendant's hands property obtained by him as a result of or in connection with his general criminal conduct<sup>13</sup>.

If a court has decided that the defendant does not have a criminal lifestyle, a gift is tainted if it was made by the defendant at any time after:

- 15 (a) the date on which the offence concerned was committed<sup>14</sup>; or
- 16 (b) if his particular criminal conduct<sup>15</sup> consists of two or more offences and they were committed on different dates, the date of the earliest<sup>16</sup>.

A gift may be a tainted gift whether it was made before or after 24 July 2002<sup>17</sup>.

1    Ie under the Proceeds of Crime Act 2002 Pt 2 (ss 6-91): see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 390 et seq.

2    See the Proceeds of Crime Act 2002 s 9(1)(b); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 397. As to the value of a tainted gift see s 81; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 396. See also s 78(2); note 10; and *R v B/lee* [2003] EWCA Crim 2126, [2004] 1 Cr App Rep (S) 212, [2003] All ER (D) 261 (Jun) (decided under the Criminal Justice Act 1988 s 74(3) (repealed)).

3    Ie a receiver appointed under the Proceeds of Crime Act 2002 s 50 or s 52: see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 439.

4    References to a 'recipient' of a tainted gift are to a person to whom the defendant has made the gift: see the Proceeds of Crime Act 2002 s 78(3); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 398.

5    See the Proceeds of Crime Act 2002 s 23(1), (5); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 409. The 'applicable provisions' are the provisions of Pt 2: see note 1.

6    Ie under the Proceeds of Crime Act 2002 ss 40-47: see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 423 et seq.

7    Ie under the Proceeds of Crime Act 2002 s 48: see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 437.

8    See the Proceeds of Crime Act 2002 s 49(6); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 438. As to the exercise of the court's and receiver's powers see further ss 49(8), (8A), 69(1), (2)(c), (3)-(5); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARAS 438, 441, 447.

9 As to whether the defendant has a criminal lifestyle see the Proceeds of Crime Act 2002 s 75, Sch 2; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARAS 392, 393.

10 If the defendant transfers property to another person for a consideration whose value is significantly less than the value of the property at the time of the transfer, he is to be treated as making a gift: see the Proceeds of Crime Act 2002 s 78(1), (2); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 398.

11 See the Proceeds of Crime Act 2002 s 77(1), (2) and (as to the 'relevant day') s 77(9); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 398.

12 See the Proceeds of Crime Act 2002 s 77(3)(a); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 398.

13 See the Proceeds of Crime Act 2002 s 77(3)(b); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 398.

14 See the Proceeds of Crime Act 2002 s 77(4), (5)(a); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 398. For these purposes an offence which is a continuing offence is committed on the first occasion when it is committed: see s 77(6); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 398.

15 For these purposes the defendant's particular criminal conduct includes any conduct which constitutes offences which the court has taken into consideration in deciding his sentence for the offence or offences concerned: see the Proceeds of Crime Act 2002 s 77(7); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 398.

16 See the Proceeds of Crime Act 2002 s 77(5)(b); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 398.

17 See the Proceeds of Crime Act 2002 s 77(8); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 398. 24 July 2002 is the date on which the Proceeds of Crime Act 2002 received the Royal Assent.

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## **265. Gifts promoting illegality.**

Gifts are necessarily illegal if their tendency is to promote unlawful acts, without regard to the amount of the inducement held out or interest created, or to the position of the parties, or to any other circumstances which go to affect the probability of the unlawful act being done<sup>1</sup>. They cannot be recovered from the donee if the parties are both culpable<sup>2</sup>.

Where property interests are acquired as a result of an illegal transaction, a party to the illegality can recover by virtue of a legal or equitable property interest if, but only if, he can establish his title without relying on his own illegality, even if it emerged that the title on which he relied was acquired in the course of carrying through an illegal transaction. Where the presumption of advancement applies, the claimant is faced with the presumption of gift and therefore cannot claim under a resulting trust unless and until he rebuts the presumption of gift, in which case he has to rely on the underlying illegality and will therefore fail<sup>3</sup>. However, where the presumption of a resulting trust applies, the claimant will not have to rely on the illegality because, if he proved that the property was vested in the defendant alone but that he has provided part of the purchase money or voluntarily transferred the property to the defendant, he will establish his claim under a resulting trust unless either the presumption of advancement displaces the presumption of resulting trust or the defendant leads evidence to rebut the presumption of resulting trust<sup>4</sup>. Therefore, in cases where the presumption of advancement does not apply, the claimant can establish his equitable interest in the property without relying in any way on the illegal transaction<sup>5</sup>.

The presumption of advancement does not override admissible evidence as to the true nature of the transaction<sup>6</sup>.

Where a person obtains property in return for unlawful conduct<sup>7</sup>, that property may be subject to civil recovery under statute<sup>8</sup>.

1 *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 174 per Lord Brougham.

2 *Parkinson v College of Ambulance Ltd and Harrison* [1925] 2 KB 1, where the plaintiff alleged that he made a donation to the college on the undertaking of an official that he would be knighted.

3 See PARA 244. A transferor who has transferred property for an illegal purpose in circumstances where the presumption of advancement applies is nevertheless entitled to withdraw from the transaction before any part of the illegal purpose has been carried into effect and, having done so, give evidence of the illegality in order to rebut the presumption and recover the property for himself as an exception to the general principle that no court will lend its aid to one who founds his action on an illegal act; moreover it is sufficient for the transferor to withdraw voluntarily from the transaction when it has ceased to be necessary without any need to repent his illegal purpose: see *Tribe v Tribe* [1996] Ch 107, [1995] 4 All ER 236, CA.

4 See PARA 241.

5 *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL; applying *Feret v Hill* (1854) 15 CB 207; *Alexander v Rayson* [1936] 1 KB 169, CA; *Bowmakers Ltd v Barnett Instruments Ltd* [1945] KB 65, [1944] 2 All ER 579, CA; *Sajan Singh v Sardara Ali* [1960] AC 167, [1960] 1 All ER 269, PC; *Chettiar v Chettiar* [1962] AC 294, [1962] 1 All ER 494, PC; and *Gorog v Kiss* (1977) 16 OR (2d) 569, 78 DLR (3d) 690, Ont CA; considering *Muckleston v Brown* (1801) 6 Ves 52 and *Curtis v Perry* (1802) 6 Ves 739; and doubting *Saunders v Edwards* [1987] 2 All ER 651, [1987] 1 WLR 1116, CA; *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, [1988] 2 All ER 23, CA; and *Howard v Shirlstar Container Transport Ltd* [1990] 3 All ER 366, [1990] 1 WLR 1292, CA. See also *Pitts v Hunt* [1991] 1 QB 24, [1990] 3 All ER 344, CA; and see **EQUITY** vol 16(2) (Reissue) PARA 560.

6 *Ali v Khan* [2002] EWCA Civ 974, (2002) 5 ITELR 232, [2002] All ER (D) 170 (Jul).

7 For these purposes, conduct occurring in any part of the United Kingdom is 'unlawful conduct' if it is unlawful under the criminal law of that part of the United Kingdom: see the Proceeds of Crime Act 2002 s 241(1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2148. As to conduct which occurs in a country outside the United Kingdom see s 241(2); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2148. The court must decide on a balance of probabilities whether it is proved that any matters alleged to constitute unlawful conduct have occurred, or that any person intended to use any cash in unlawful conduct: see s 241(3); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2148.

A person 'obtains' property through unlawful conduct (whether his own conduct or another's) if he obtains property by or in return for the conduct: see s 242(1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2148. In deciding whether any property was obtained through unlawful conduct it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct and it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct: see s 242(2); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2148.

8 See under the Proceeds of Crime Act 2002 Pt 5 (ss 240-316): see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2147 et seq.

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## 266. Gifts and appropriation under the law relating to theft.

A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it<sup>1</sup>. Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property, innocently or not, without stealing it, any later assumption of a right to it by keeping or dealing with it as owner<sup>2</sup>. The Court of Appeal has ruled<sup>3</sup>, and the House of Lords has confirmed<sup>4</sup>, that the acquisition of an indefeasible title to property, as where the defendant has acquired it by

means of a gift made by the owner, is capable of amounting to an appropriation of property belonging to another for these purposes, and conduct which is not wrongful in a civil law sense may thus constitute the crime of theft if the requisite mental elements are satisfied<sup>5</sup>.

1 See the Theft Act 1968 s 1(1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 282 et seq.

2 See the Theft Act 1968 s 3(1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 284.

3 *R v Hinks* [2000] 1 Cr App Rep 1 at 9, CA, per Rose LJ ('In our judgment, in relation to theft, one of the ingredients for a jury to consider is not whether there has been a gift, valid or otherwise, but whether there has been an appropriation. A gift may be clear evidence of appropriation. But a jury should not, in our view, be asked to consider whether a gift has been validly made'). See, however, the criticism of this dictum on further appeal in the dissenting judgment of Lord Hobhouse of Woodborough [2001] 2 AC 241 at 266, [2000] 4 All ER 833 at 856, HL.

4 See *R v Hinks* [2001] 2 AC 241, [2000] 4 All ER 833, HL.

5 See *R v Hinks* [2001] 2 AC 241 at 252, [2000] 4 All ER 833 at 843, HL, per Lord Steyn, Lords Slynn of Hadley and Jauncey of Tullichettle concurring (a case based on an allegation that the defendant had coerced or unduly influenced an 'extremely naive and gullible' person into parting with his money and a television set). Lord Hutton, however, while agreeing that the acceptance of a gift of property could amount to appropriation, went on to say (at 256-258 and at 847-848) '[I]t appears contrary to common sense that a person who receives money or property as a gift could be said to act dishonestly, no matter how much ordinary and decent people would think it morally reprehensible for that person to accept the gift . . . It follows, a fortiori, that a person's appropriation of property belonging to another should not be regarded as dishonest if the other person actually gives the property to him . . . ; but the simple proposition that a person who receives property as a gift is not to be regarded as dishonest becomes more difficult to apply where the prosecution alleges that the gift was void or voidable by reason of circumstances known to the defendant.' See also at 263-265 and at 854-856 per Lord Hobhouse of Woodborough ('The truth is that theft is a crime which relates to civil property and, inevitably, property concepts from the civil law have to be used and questions answered by reference to that law . . . Where the defendant has been validly given the property he can no longer appropriate property belonging to another . . . There is no law against appropriating your own property as defined by [the Theft Act 1968] s 5').

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## **(9) INCOMPLETE GIFTS**

### **267. Court will not complete incomplete gift.**

Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it<sup>1</sup>, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise<sup>2</sup>. A promise made by deed is, however, binding even though it is made without consideration<sup>3</sup>. If a gift is to be valid the donor must have done everything which, according to the nature of the property comprised in the gift, was necessary to be done by him<sup>4</sup> in order to transfer the property and which it was in his power to do<sup>5</sup>. If a gift is intended to be effectuated by one mode, for example by actual transfer to the donee, the court will not give effect to it by applying one of the other modes<sup>6</sup>.

An incomplete gift can be revoked at any time<sup>7</sup>; there is a power to draw back so long as the gift is incomplete<sup>8</sup>. No question of conscience enters into the matter, for there is no consideration and there is nothing dishonest on the part of an intending donor who chooses to change his mind at any time before the gift is complete<sup>9</sup>.



1 *Wycherley v Wycherley* (1763) 2 Eden 175; *Ellison v Ellison* (1802) 6 Ves 656; *Antrobus v Smith* (1805) 12 Ves 39; *Hooper v Goodwin* (1818) 1 Swan 485; *Ward v Audland* (1845) 8 Beav 201; *Kekewich v Manning* (1851) 1 De GM & G 176, CA in Ch; *Lambert v Overton* (1864) 11 LT 503; *Forrest v Forrest* (1865) 11 LT 763; *Re Fennings, Bailey v Beaven* (1900) 16 TLR 427 (envelopes addressed to various persons, containing notes and cheques); *Re Churchill, Taylor v Manchester University* [1917] 1 Ch 206; *Macedo v Stroud* [1922] 2 AC 330, PC. In *Easton v Pratchett* (1835) 1 Cr M & R 798 at 808, Lord Abinger CB said 'If a man give money as a gratuity, it cannot be recovered back, because the act is complete; yet a man who promises to give money cannot be sued on such promise; and if so, I do not see how a promise in writing not under seal, can have any binding effect. The law makes no difference between such a promise and a verbal one. There is the same distinction as to a bill of exchange. If a party gives to another a negotiable instrument, on which other parties are liable, the man who makes the gift cannot recover the bill back, and the man to whom the bill is given may recover against the other parties on the bill'. For this case on appeal see 2 Cr M & R 542, Ex Ch. See also *Gould v Stamp Duties Comr* [1934] AC 69, PC.

2 See PARA 270.

3 See **CONTRACT** vol 9(1) (Reissue) PARA 617, where the exception (not material here) of a covenant in restraint of trade is stated. See also *Alexander v Brame* (1855) 7 De GM & G 525; on appeal sub nom *Jeffries v Alexander* (1860) 8 HL Cas 594 (a covenant under seal to pay money to a charity).

4 The test is whether any act remains to be done by the donor and not the donee or trustees in order to perfect the title to the property: see *Fortescue v Barnett* (1834) 3 My & K 36 at 43 (assignment of policy of assurance; trustees' duty to give notice to assurance office); *Donaldson v Donaldson* (1854) Kay 711 at 719 (notice to be given by donee to trustees to complete title) (commenting on *Edwards v Jones* (1836) 1 My & Cr 226); *Re King, Sewell v King* (1879) 14 ChD 179 (assignment of life assurance policy; notice to be given by assignee); *Re Griffin, Griffin v Griffin* [1899] 1 Ch 408 at 411; *Re Rose, Midland Bank Executor and Trustee Co Ltd v Rose* [1949] Ch 78, [1948] 2 All ER 971 (transfer of shares; registration required to complete title not an act required to be done by the transferor); approved in *Re Rose, Rose v IRC* [1952] Ch 499, [1952] 1 All ER 1217, CA. Cf *Re Fry, Chase National Executors and Trustees Corp v Fry* [1946] Ch 312, [1946] 2 All ER 106, where the transferor, who failed to obtain Treasury consent to a transfer of shares as required by the Defence (Finance) Regulations 1939, SR & O 1939/950, reg 3A (now revoked) was held not to have done all that he could have done to divest himself of his legal and equitable interest in the shares and the gift was therefore incomplete; *Rowlandson v National Westminster Bank Ltd* [1978] 3 All ER 370, [1978] 1 WLR 798 (principle said to be that, if a stage is reached when the donees no longer need the assistance of the court to perfect the gifts to them, the intention to give continuing, the gifts are perfected). In *Re Rose, Rose v IRC* the Court of Appeal took the view that the delivery of the share transfers was required. It has since been held that delivery may be dispensed with in circumstances in which it would be unconscionable to recall the gift: *Pennington v Waine* [2002] EWCA Civ 227, [2002] 4 All ER 215, [2002] 1 WLR 2075. See PARA 269.

5 *Milroy v Lord* (1862) 4 De GF & J 264 at 274 per Turner LJ; *Harding v Harding* (1886) 17 QBD 442; *Re Griffin, Griffin v Griffin* [1899] 1 Ch 408; *Re Williams, Williams v Ball* [1917] 1 Ch 1, CA; *Re McArdle* [1951] Ch 669, [1951] 1 All ER 905, CA; *Re Rose, Rose v IRC* [1952] Ch 499, [1952] 1 All ER 1217, CA; *Letts v IRC* [1956] 3 All ER 588, [1957] 1 WLR 201; *Mascall v Mascall* (1984) 50 P & CR 119, CA (gift of land complete when father handed over transfer and land certificate to son, who was left to have the transfer stamped and title in the land register altered). See also *Jaffa v Taylor Gallery Ltd, Jaffa v Harris* (1990) Times, 21 March; and PARA 238 note 1. A registrable disposition of a registered estate only has effect if it complies with such requirements as to form and content as rules may provide, and if a disposition of a registered estate is required to be completed by registration, it does not operate at law until the relevant registration requirements are met: see the Land Registration Act 2002 ss 25(1), 27(1); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 910, 911. A transfer of a registered estate is required to be completed by registration: see s 27(2)(a); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 912. As to the completion of registration see the Land Registration Rules 2003, SI 2003/1417, Pt 6 (rr 54-79A); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 911 et seq.

6 See *Milroy v Lord* (1862) 4 De GF & J 264 at 274, CA in Ch, per Turner LJ; and the cases cited in PARA 269 note 2. As to the modes of making gifts inter vivos see PARA 231 et seq.

7 *Standing v Bowring* (1885) 31 ChD 282 at 290, CA.

8 *Antrobus v Smith* (1805) 12 Ves 39.

9 *Re McArdle* [1951] Ch 669, [1951] 1 All ER 905, CA.

## 268. Choses or things in action.

In order that a voluntary equitable assignment of an equitable chose or thing in action may be valid it must be in all respects complete and perfect, so that the assignee is entitled to demand payment from the trustee or holder of the fund or debt and the trustee or holder is bound to make payment to the assignee, with no further act on the assignor's part remaining to be done to perfect the assignee's title<sup>1</sup>. Notice to the debtor is not necessary to make the gift complete between the assignor and assignee<sup>2</sup>.

If a person entitled to an allotment of shares in a company gives a direction in writing to the company to allot them to a donee, the direction may constitute a valid equitable assignment of the shares and thus complete a gift of the shares<sup>3</sup>.

A cheque is not money or the indicia of title to money. It is merely a mandate to the donor's bank, which is revoked by his death, unless before that event the cheque is presented and paid<sup>4</sup>. If, however, a person to whom another gives, as a present, a cheque on his own account, pays it away for valuable consideration, or in payment of a debt of his own, before the bank is apprised of the drawer's death, the gift is, apparently, not revoked<sup>5</sup>. If a person merely places a cheque, drawn by a third person in his favour, into the hand of another and then takes it away and locks it up, there is not a complete gift<sup>6</sup>.

Neither at law nor in equity can the payee under a promissory note, which appears upon the facts before the court to be voluntary, have any claim as a creditor<sup>7</sup>.

1 *Re McArdle* [1951] Ch 669, [1951] 1 All ER 905, CA. See also the cases cited in PARA 267 notes 4, 5; and **CHOSES IN ACTION** vol 13 (2009) PARA 33. As to the modes of effecting equitable assignments see **CHOSES IN ACTION** vol 13 (2009) PARA 24 et seq.

2 See **CHOSES IN ACTION** vol 13 (2009) PARA 32.

3 *Letts v IRC* [1956] 3 All ER 588, [1957] 1 WLR 201.

4 *Re Swinburne, Sutton v Featherley* [1926] Ch 38, CA, disapproving *Bromley v Brunton* (1868) LR 6 Eq 275. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1404. For a case of reduction of a voluntary pension see *Marchant v Lee Conservancy Board* (1874) LR 9 Exch 60. See also *Tate v Leithead* (1854) Kay 658; *Hewitt v Kaye* (1868) LR 6 Eq 198 (a case of a gift mortis causa, but the principle is the same in the case of a gift inter vivos); *Re Owen, Owen v IRC* [1949] 1 All ER 901; *Curnock (Personal Representatives of Curnock) v IRC* [2003] STC (SCD) 283.

5 *Tate v Hilbert* (1793) 2 Ves 111 at 118; *Rolls v Pearce* (1877) 5 ChD 730.

6 *Jones v Lock* (1865) 1 Ch App 25.

7 *Re Whitaker* (1889) 42 ChD 119 at 124, CA, per Cotton LJ; and see PARA 225.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/1. GIFTS MADE BETWEEN LIVING PERSONS/(9) INCOMPLETE GIFTS/269. Incomplete gift and declaration of trust distinguished.

## 269. Incomplete gift and declaration of trust distinguished.

The principle of the distinction between a declaration of trust and an intended gift is that in the former case a person shows an intention to make himself a trustee, whereas words of gift show an intention to deliver over the property to another, and not to retain it in the intending donor's possession for any purpose, fiduciary or otherwise<sup>1</sup>. Consequently equity will not assist in completing an imperfect gift by holding that the intending donor is a trustee for the intended

donee<sup>2</sup>. With yet stronger reason, equity will not in general compel the donor's executor to complete the gift<sup>3</sup>, even though partly performed during the lifetime of the deceased<sup>4</sup>, but if there has been consideration<sup>5</sup> for the promise, as where the promisee has expended money or incurred an obligation on the faith of the promise, the deceased's estate is liable to the extent to which the money has been spent or obligation incurred<sup>6</sup>. Equity will not, however, strive officiously to defeat a gift<sup>7</sup>; and a valid trust has been established in an intermediate case where in a composite transaction taking place on the same day a donor declares that he is giving, and later that he has given, property to a trust which he has himself established and of which he has appointed himself to be a trustee<sup>8</sup>.

A promise to pay a sum of money to some charitable object cannot be enforced against the promisor's estate, even though part may have been paid in his lifetime<sup>9</sup>. But it has been held that if a person promises to leave a sum of money to a school society for the prosecution of its undertaking, and in consequence the society establishes a school, the society can recover the sum promised<sup>10</sup>.

The intention to declare a trust may be incomplete or the trust may be an attempt to evade the law<sup>11</sup>, or the object or objects intended to be benefited may not be sufficiently ascertained<sup>12</sup>, and in none of these cases will the gift be upheld.

If it is uncertain which of several objects is intended to be given, there is no valid gift unless the donee is given power to choose which he will take<sup>13</sup>; the right of selection may be given expressly or by inference<sup>14</sup> and, except in special cases, will rest with the donee<sup>15</sup>.

Although the court will not generally assist an intended donee to complete an incomplete gift, neither will it, at the instance of a donor who repents of his intended gift, compel a deed of inchoate gift to be delivered up<sup>16</sup>.

1 *Richards v Delbridge* (1874) LR 18 Eq 11 at 15 per Sir George Jessel MR.

2 *Ellison v Ellison* (1802) 6 Ves 656; *Harding v Harding* (1886) 17 QBD 442; *Mallott v Wilson* [1903] 2 Ch 494 at 500 per Byrne J; *Milroy v Lord* (1862) 4 De GF & J 264 at 274, CA in Ch, per Turner LJ. The following are some of the cases in which, the proper formalities of a present gift not having been observed, the attempt to establish a declaration of trust has failed: *Antrobus v Smith* (1805) 12 Ves 39 (shares in the Forth and Clyde Navigation); *Cotteen v Missing* (1815) 1 Madd 176 (letter consenting to a sum being given); *Edwards v Jones* (1836) 1 My & Cr 226 (bond); *Dillon v Coppin* (1839) 4 My & Cr 647 (East India stock and shares in the Globe Insurance Company); *Meek v Kettlewell* (1843) 1 Ph 342 (assignment of a spes successionis which operates only as an agreement); *Searle v Law* (1846) 15 Sim 95 (turnpike securities); *Price v Price* (1851) 14 Beav 598 (gift of land, a house, and chattels by deed poll); affd on appeal, on different grounds, (1852) 1 De GM & G 308; *Bridge v Bridge* (1852) 16 Beav 315 (Colombian bonds, Consols and cash); *Weale v Ollive* (1853) 17 Beav 252 (United States bank shares); *Beech v Keep* (1854) 18 Beav 285 (Consols); *Peckham v Taylor* (1862) 31 Beav 250 (where a power of attorney was not acted on); *Richards v Delbridge* (1874) LR 18 Eq 11 (leasehold mill, plant, machinery and stock-in-trade); *Warriner v Rogers* (1873) LR 16 Eq 340 (statements of a gift held to be of a testamentary character); *Moore v Moore* (1874) LR 18 Eq 474 (debenture); *Heartley v Nicholson* (1875) LR 19 Eq 233 (shares); *Re Breton's Estate, Breton v Woollven* (1881) 17 ChD 416 (furniture); *Re Shield, Pethybridge v Burrow* (1885) 53 LT 5, CA (debenture stock); *Re Ashcroft, ex p Todd* (1887) 19 QBD 186, CA (Dutch Rhenish Railway shares included in a voluntary settlement); *Vincent v Vincent* (1887) 56 LT 243, CA (where a man sent a letter to his future wife, saying he willed and bequeathed to her certain property); *O'Flaherty v Browne* [1907] 2 IR 416, CA (deposit receipt; an attempt to pass property after death without making a will); and see generally **EQUITY** vol 16(2) (Reissue) PARA 610.

3 *Ward v Audland* (1845) 8 Beav 201. Thus a voluntary covenant to surrender copyholds, though contained in a deed in which freeholds were effectively conveyed, would not have been enforced unless words of trust were added: *Jefferys v Jefferys* (1841) Cr & Ph 138; *Re Rose, Midland Bank Executor and Trustee Co Ltd v Rose* [1949] Ch 78 at 89, [1948] 2 All ER 971 at 978. Copyholds were abolished by the Law of Property Act 1922 Pt V (ss 128-137) (largely repealed): see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 641 et seq; **REAL PROPERTY** vol 39(2) (Reissue) PARA 31 et seq.

4 *Re Churchill, Taylor v Manchester University* [1917] 1 Ch 206; cf *Pennington v Waine* [2002] EWCA Civ 227, [2002] 4 All ER 215, [2002] 1 WLR 2075 (completed share transfer not delivered prior to death); and see the text and notes 7-8; and **EQUITY** vol 16(2) (Reissue) PARA 610.

5 See **CONTRACT** vol 9(1) (Reissue) PARA 727 et seq.

6 *Crosbie v McDoual* (1806) 13 Ves 148; *Re Viscount Mountgarret, Ingilby v Talbot* (1913) 29 TLR 325; *Re Soames, Church Schools Co Ltd v Soames* (1897) 13 TLR 439; *Hohler v Aston* [1920] 2 Ch 420. See also *Re McArdle* [1951] Ch 669 at 678, [1951] 1 All ER 905 at 910, CA; *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL. As to the binding effect of contracts relating to wills see **WILLS** vol 50 (2005 Reissue) PARAS 318-319; and as to the use of proprietary estoppel to circumvent formal testamentary requirements see **ESTOPPEL** vol 16(2) (Reissue) PARA 1094.

7 See *T Choithram International SA v Pagarani* [2001] 2 All ER 492 at 501, [2001] 1 WLR 1 at 11, PC, per Lord Browne-Wilkinson, cited by Arden LJ in *Pennington v Waine* [2002] EWCA Civ 227 at [60], [2002] 4 All ER 215 at [60], [2002] 1 WLR 2075 at [60].

8 *T Choithram International SA v Pagarani* [2001] 2 All ER 492, [2001] 1 WLR 1, PC. See also *Pennington v Waine* [2002] EWCA Civ 227 at [61], [2002] 4 All ER 215 at [61], [2002] 1 WLR 2075 at [61] per Arden LJ ('the principle that, where a gift is imperfectly constituted, the court will not hold it to operate as a declaration of trust, does not prevent the court from construing it to be a trust if that interpretation is permissible as a matter of construction, which may be a benevolent construction'); and PARA 267.

9 *Re Hudson, Creed v Henderson* (1885) 54 LJCh 811; *Re Cory, Kinnaird v Cory* (1912) 29 TLR 18, where promises were held not binding on the testator's estate, although the managers of one of the institutions affected stated that they had entered into a building agreement relying on the promise. See **CHARITIES** vol 8 (2010) PARA 84.

10 *Re Soames, Church Schools Co Ltd v Soames* (1897) 13 TLR 439.

11 *Smith v Warde, Duckett v Warde* (1845) 15 Sim 56, where a father intended that stock should be transferred into his own and his wife's names in trust for his child, but the bank refused to allow any reference to the trust and no formal declaration was ever executed; *Field v Lonsdale* (1850) 13 Beav 78, where, in the case of an investment in a savings bank in a man's name in trust for his sister in order to evade a rule as to the amount permitted on deposit, it was held that no trust was created.

12 *Roberts v Roberts* (1865) 13 LT 492; revsd on the facts (1866) 15 LT 260.

13 *Shep Touch* (7th Edn) 242, 250, 252. Thus a gift of 'a horse or a cow' (in the disjunctive), or of one of the donor's horses, when he has several, gives a power of selection to the donee which must be exercised in the donor's lifetime. As to selection by a donee under a will see **WILLS** vol 50 (2005 Reissue) PARA 418.

14 See *Asten v Asten* [1894] 3 Ch 260 at 263 (testamentary gift), where, however, there was held to be no right of selection and the gift failed. See generally **WILLS** vol 50 (2005 Reissue) PARA 418.

15 Perkins's Profitable Book (Laws of England) 17.

16 *De Hoghton v Money* (1865) LR 1 Eq 154; affd (1866) 2 Ch App 164.

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## 270. Completion of incomplete gift.

The subsequent acts of the donor may give the intended donee a right to enforce an incomplete gift. Thus, if a donor puts the donee into possession of a piece of land and tells him that he has given it to him so that he may build a house on it, and the donee accordingly, and with the donor's assent, expends money in building a house, the donee can call on the donor or his representatives to complete the gift<sup>1</sup>.

An imperfect gift may also be perfected by the donor appointing the donee to be his executor<sup>2</sup> or one of his executors<sup>3</sup>, or by the donee being appointed the donor's administrator or one of his administrators<sup>4</sup>. The principle is that where a testator has expressed the intention of making a gift of property belonging to him to one who upon his death becomes his personal representative, the intention continuing unchanged, the representative is entitled to hold the property for his own benefit<sup>5</sup>. The donor's intention to give must not be an intention of

testamentary benefaction, even though the intended donee is the executor; for, if so, the rule cannot apply, the prescribed formalities for testamentary disposition not having been observed<sup>6</sup>. Further, there must be a present intention of giving certain definite property, the gift being imperfect for some reason at law, and not a mere promise to give on a future occasion<sup>7</sup>.

The rule<sup>8</sup> premises that the donor's donative intention should continue unchanged until his death, and, if the proper inference from the evidence is merely that he probably forgot about the imperfect gift, the evidence will not establish the continuing intention required by the rule and the gift will fail<sup>9</sup>. If, however, the donative intention continues until the date of the will, and the will contains a confirmation of the gift, then any communication of a change of intention by the testator to a third person will not revoke or modify the confirmation<sup>10</sup>.

The rule<sup>11</sup> applies to the intended forgiveness of a debt by a testator if there is sufficient evidence of his intention during his life to forgive it<sup>12</sup>.

1 *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; and see **ESTOPPEL** vol 16(2) (Reissue) PARA 1089 et seq.

2 *Strong v Bird* (1874) LR 18 Eq 315; *Re Griffin, Griffin v Griffin* [1899] 1 Ch 408; *Re Wilson, Grove-White v Wilson* [1933] IR 729; *Re Nelson, Nelson v Nelson* (1947) 91 Sol Jo 533. This principle applies also to realty: see *Re Comberbach, Saunders v Jackson* (1929) 73 Sol Jo 403; *Re James, James v James* [1935] Ch 449. No assent is required.

3 *Re Stewart, Stewart v McLaughlin* [1908] 2 Ch 251. See **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 22.

4 *Re James, James v James* [1935] Ch 449 at 451 per Farwell J: 'It is now well settled that in [the case of an imperfect gift] equity will not aid the donee, but on the other hand if the donee gets the legal title to the property vested in him he no longer wants the assistance of equity and is entitled to rely on his legal title as against the donor or persons claiming through him'. *Re James* was followed in *Re Gonin* [1979] Ch 16, sub nom *Re Gonin, Gonin v Garmeson* [1977] 2 All ER 720, where, however, Walton J expressed doubt as to whether it was right in principle, it seeming wrong that it should depend on the chance of who should manage to obtain a grant of letters of administration. See also *Re Greene, Greene v Greene* [1949] Ch 333 at 339, [1949] 1 All ER 167 at 170.

5 *Re Stewart, Stewart v McLaughlin* [1908] 2 Ch 251 at 254 per Neville J, stating the principle decided in *Strong v Bird* (1874) LR 18 Eq 315, which was adopted by Upjohn J in *Re Wale, Wale v Harris* [1956] 3 All ER 280 at 285, [1956] 1 WLR 1346 at 1352. The principle is commonly referred to as 'the rule in *Strong v Bird*'. An analogous principle applies in the case of a voluntary settlement of property which is not initially transferred to the trustees, but subsequently vests in them, even in some other capacity: see *Re Ralli's Will Trust, Calvocoressi v Rodocanachi* [1964] Ch 288, [1963] 3 All ER 940. See also *Rowlandson v National Westminster Bank Ltd* [1978] 3 All ER 370, [1978] 1 WLR 798.

6 *Re Stewart, Stewart v McLaughlin* [1908] 2 Ch 251 at 255; *Selwin v Brown* (1735) 3 Bro Parl Cas 607, HL; *Re Hyslop, Hyslop v Chamberlain* [1894] 3 Ch 522.

7 *Re Innes, Innes v Innes* [1910] 1 Ch 188; *Re Wilson, Grove-White v Wilson* [1933] IR 729; *Re Freeland, Jackson v Rodgers* [1952] Ch 110, [1952] 1 All ER 16, CA.

8 Is the rule in *Strong v Bird* (1874) LR 18 Eq 315: see note 5. See also *Re Gonin* [1979] Ch 16, sub nom *Re Gonin, Gonin v Garmeson* [1977] 2 All ER 720.

9 *Re Wale, Wale v Harris* [1956] 3 All ER 280, [1956] 1 WLR 1346.

10 *Re Stoneham, Stoneham v Stoneham* [1919] 1 Ch 149 at 158 per PO Lawrence J.

11 Is the rule in *Strong v Bird* (1874) LR 18 Eq 315: see note 5.

12 *Strong v Bird* (1874) LR 18 Eq 315; see *Re Applebee, Leveson v Beales* [1891] 3 Ch 422; *Re Pink, Pink v Pink* [1912] 2 Ch 528, CA; *Re Goff, Featherstonehaugh v Murphy* (1914) 111 LT 34 per Sargant J (the legal release of the debt by appointment of the debtor as executor, coupled with a continuing intention to release the debt, was sufficient).

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/2. GIFTS MADE IN CONTEMPLATION OF DEATH/271. Nature of gift mortis causa.

## 2. GIFTS MADE IN CONTEMPLATION OF DEATH

### 271. Nature of gift mortis causa.

A gift made in contemplation of death (a gift mortis causa) is neither entirely made inter vivos nor testamentary<sup>1</sup>. It must be made in contemplation, though not necessarily in expectation, of the death of the donor, in circumstances which show that it is to take effect only in that event, and so as to be recoverable by the donor if that event does not occur, and void if the donee dies before it occurs<sup>2</sup>. A gift mortis causa has in effect the nature of a legacy, and is only a gift on survivorship<sup>3</sup>. It is not unusual for the evidence of this kind of gift to be that of the donee alone<sup>4</sup>.

There must be delivery to the donee or his agent of the subject of the gift, or a transfer of the means or part of the means of getting at the property<sup>5</sup>, although the actual delivery need not be by the donor himself, but may be by a person directed by him to make it<sup>6</sup>; but the delivery must be to the donee or someone for the donee, for mere delivery to an agent in the character of agent for the donor amounts to nothing<sup>7</sup>. It must clearly appear that the delivery was by way of gift, and not merely to take care of the object for the donor<sup>8</sup>. The delivery to the donee may be as trustee for any other person or persons or for a special purpose<sup>9</sup>. The expression of the trust or condition must form part of the donation, and be either contemporaneous with it or be so coupled with it by contemporaneous words of reference as, in effect, to be incorporated with it<sup>10</sup>.

1 *Re Beaumont, Beaumont v Ewbank* [1902] 1 Ch 889 at 892 per Buckley J. In reference to a conflict of laws it is dealt with as a gift inter vivos: *Re Korvine's Trust, Levashoff v Block* [1921] 1 Ch 343.

2 *Sen v Headley* [1991] Ch 425, [1991] 2 All ER 636, CA. See also *Hedges v Hedges* (1708) Prec Ch 269; *Tate v Hilbert* (1793) 2 Ves 111 at 119; *Gardner v Parker* (1818) 3 Madd 184; *Cain v Moon* [1896] 2 QB 283; *Re Lillingston, Pembery v Pembery* [1952] 2 All ER 184; and see *Re Korvine's Trust, Levashoff v Block* [1921] 1 Ch 343; *Lord Advocate v King* [1953] TR 119. The death contemplated need not be death from sickness: *Walter v Hodge* (1818) 2 Swan 92 at 100. Formerly the gift must not have been in contemplation of suicide, as that would have made the gift contrary to public policy (*Re Dudman, Dudman v Dudman* [1925] Ch 553, following *Agnew v Belfast Banking Co* [1896] 2 IR 204, CA, where it was also held that as the intending donor had been held to have committed suicide during temporary insanity, she was mentally incapable of making the gift); however as suicide is no longer a crime (see the Suicide Act 1961 s 1) this may not still be the case. The Chief Registrar of Friendly Societies has held valid a gift made in contemplation of suicide: see the Report of the Chief Registrar of Friendly Societies 1965, pp 13-14. See also *Mills v Shields and Kelly* [1948] IR 367, where the donor did not contemplate suicide at the time of the gift.

3 *Tate v Hilbert* (1793) 2 Ves 111 at 120.

4 *Re Richards, Jones v Rebbeck* [1921] 1 Ch 513 at 519; and see PARAS 216-217.

5 *Sen v Headley* [1991] Ch 425, [1991] 2 All ER 636, CA; *Re Wasserberg, Union of London and Smiths Bank Ltd v Wasserberg* [1915] 1 Ch 195. See PARA 273 note 1.

6 *Miller v Miller* (1735) 3 P Wms 356; cf *Hutchieson's Executrix v Shearer* 1909 SC 15; *Nelson v Prudential Assurance Co* [1929] NI 113.

7 *Farquharson v Cave* (1846) 2 Coll 356; *Powell v Hellicar* (1858) 26 Beav 261; *Re Kirkley, Cort v Watson* (1909) 25 TLR 522; *Re Thompson's Estate, Goff v Duffield* [1928] IR 606 (handed to donor's servant); see also *Moore v Darton* (1851) 4 De G & Sm 517; *Re Beaumont, Beaumont v Ewbank* [1902] 1 Ch 889.

8 *Wildish v Fowler* (1890) 6 TLR 422, CA; affd (1892) 8 TLR 457, HL; *Ashton v Dawson and Vincent* (1725) 2 Coll 363n.

9 *Blount v Burrow* (1792) 4 Bro CC 72; *Hills v Hills* (1841) 8 M & W 401, where the donor desired the donee to pay for her funeral out of the gift; see also *Bouts v Ellis* (1853) 17 Beav 121; affd 4 De GM & G 249.

10 *Dunne v Boyd* (1874) IR 8 Eq 609.

Halsbury's Laws of England/GIFTS (VOLUME 52 (2009) 5TH EDITION)/2. GIFTS MADE IN CONTEMPLATION OF DEATH/272. Completion of title to a gift mortis causa.

## 272. Completion of title to a gift mortis causa.

The donee's title to a gift mortis causa can never be complete until the donor is dead<sup>1</sup>. A gift mortis causa does not vest in the donor's personal representatives, and so does not require any act by them to constitute a title in the donee<sup>2</sup>. If, therefore, on the donor's death, the subject of the gift is not already completely vested in the donee the question arises whether he can call on the donor's personal representatives to make good his title<sup>3</sup>. A good gift mortis causa, where the subject of the gift is not completely vested in the donee, raises by operation of law a trust, which was not within the Statute of Frauds<sup>4</sup>, and the court, by the application of equitable principles, assists the donee to perfect his title. The donee is accordingly entitled to call upon the donor's representatives to lend him their name, or to give him their indorsement, in order that he may complete his title<sup>5</sup>. The title remains in the donor until the event happens which is to divest him, that is his death, so that, if it appears that the donor intended to divest his interest at once, the transaction will be treated as a gift made inter vivos, complete or incomplete as the case may be, and not as a gift mortis causa<sup>6</sup>.

There is an implied condition that the gift is to be retained only in the event of death, even though the donor does not expressly say so<sup>7</sup>. The death may take place some time afterwards<sup>8</sup>, or the donor may actually die from some other illness<sup>9</sup>, but if the donor recovers from the illness during which the gift is made the donee has no title, and can only hold what was delivered to him in trust for the donor<sup>10</sup>.

Where a court determines that the forfeiture rule, which precludes a person in certain circumstances who has unlawfully killed another from acquiring a benefit in consequence of the killing, has precluded a person from acquiring an interest under a gift mortis causa made by the deceased, it may make an order modifying the effect of that rule<sup>11</sup>.

1 *Duffield v Elwes* (1827) 1 Bli NS 497 at 530, HL, per Lord Eldon.

2 *Tate v Hilbert* (1793) 2 Ves 111 at 120. A grant of representation is unnecessary in so far as the deceased has disposed of property by gifts mortis causa. See also **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 340.

3 *Duffield v Elwes* (1827) 1 Bli NS 497, HL; *Re Beaumont, Beaumont v Ewbank* [1902] 1 Ch 889 at 893 per Buckley J ('The question is not whether there is a complete title, but whether the donee can call upon the legal personal representative of the donor to make good his title'). In *Cosnahan v Grice* (1862) 15 Moo PCC 215, it is stated that the fact of the donor's being on his death bed is sufficient proof of the gift being made in contemplation of death.

4 See the Statute of Frauds (1677) s 8 (repealed; in part replaced by the Law of Property Act 1925 s 53(2) (see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 24)); and see *Duffield v Elwes* (1827) 1 Bli NS 497 at 543-544, HL.

5 *Duffield v Elwes* (1827) 1 Bli NS 497, HL; *Re Beaumont, Beaumont v Ewbank* [1902] 1 Ch 889 at 894 per Buckley J; see also *Re Dillon, Duffin v Duffin* (1890) 44 ChD 76 at 82, CA, per Cotton LJ; *Re Richards, Jones v Rebbeck* [1921] 1 Ch 513 at 521.

6 *Tate v Hilbert* (1793) 2 Ves 111; *Edwards v Jones* (1835) 7 Sim 325; affd (1836) 1 My & Cr 226.

7 *Gardner v Parker* (1818) 3 Madd 184; *Tate v Leithead* (1854) Kay 658 at 662; see also *Irons v Smallpiece* (1819) 2 B & Ald 551 at 553.

8 *Re Weston, Bartholomew v Menzies* [1902] 1 Ch 680; see also *Re Richards, Jones v Rebbeck* [1921] 1 Ch 513, where the donor did not undergo the contemplated operation.

9 *Wilkes v Allington* [1931] 2 Ch 104.

10 *Staniland v Willott* (1852) 3 Mac & G 664.

11 See the Forfeiture Act 1982 s 2(1), (4)(iii); and **WILLS** vol 50 (2005 Reissue) PARA 342. See also *Re K* [1986] Ch 180, [1985] 2 All ER 833, CA.

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### 273. Delivery of chattels.

In the case of chattels personal, while delivery of the subject matter of the gift, or a transfer of the means or part of the means of getting at it, is necessary<sup>1</sup>, it need not be at the actual moment of the gift<sup>2</sup>, and antecedent delivery, even though for another purpose, is sufficient<sup>3</sup>. Complete dominion over the subject matter of the gift must be intended to pass to the donee<sup>4</sup>, but where the property is too bulky for delivery the means of coming at the possession or making use of it, for example a key, may be delivered, so as to constitute a good gift<sup>5</sup>. The key must be handed over with a view to a gift, and not merely to open a box which contains directions as to how the contents are to be distributed<sup>6</sup>. The donor must part with dominion over the key<sup>7</sup>. On the other hand, delivery of something merely as a symbol of the subject matter of the intended gift is not sufficient<sup>8</sup>, nor is the giving of a power of attorney enough<sup>9</sup>, but one person may take as agent for another, and where a joint gift is intended he may take delivery for himself and as agent for the joint donee<sup>10</sup>.

1 *Miller v Miller* (1735) 3 P Wms 356 (coach and horses); *Bunn v Markham* (1816) 7 Taunt 224; *Ward v Turner* (1752) 2 Ves Sen 431; *Re Hughes* (1888) 59 LT 586, CA; *Re Wasserberg, Union of London and Smiths Bank Ltd v Wasserberg* [1915] 1 Ch 195. A mere shifting from one drawer to another is insufficient: *Bryson v Brownrigg* (1803) 9 Ves 1. Although in *Tate v Hilbert* (1793) 2 Ves 111 it was said to be conceivable that the gift might be made by deed or writing, it is improbable that it should be so when the donor is *in extremis*. In *Johnson v Smith* (1749) 1 Ves Sen 314, Lord Hardwicke referred to a deed of gift as 'a kind of gift mortis causa'. 'These gifts depend for their validity on the physical delivery to the donee of something the possession of which may confer a title to claim the real subject of the gift': see *Joseph v Philips* [1934] AC 348 at 353, PC.

2 *Re Weston, Bartholomew v Menzies* [1902] 1 Ch 680.

3 *Cain v Moon* [1896] 2 QB 283; *Birch v Treasury Solicitor* [1951] Ch 298 at 303, [1950] 2 All ER 1198 at 1202, CA.

4 *Hawkins v Blewitt* (1798) 2 Esp 663; *Reddel v Dobree* (1839) 10 Sim 244; *Treasury Solicitor v Lewis* [1900] 2 Ch 812; *Re Johnson, Sandy v Reilly* (1905) 92 LT 357, where it was held that there was no gift, as the intending donor retained the key.

5 *Jones v Selby* (1710) Prec Ch 300 (key of a trunk); *Re Mustapha, Mustapha v Wedlake* (1891) 8 TLR 160 (key of a wardrobe in which was the key of a safe containing bonds which were held to pass); *Re Lillingston, Pembury v Pembury* [1952] 2 All ER 184 (key of a trunk in which was the key of a safe deposit in which was the key of another safe deposit). As to delivery generally see PARAS 237-238.

6 *Re Harrison, Public Trustee v Best* [1934] WN 25, where a box held parcels containing Treasury notes and directions for their distribution.

7 *Re Mulroy, M'Andrew v Mulroy* [1924] 1 IR 98, where the deceased unlocked the box, showed the contents to the alleged donee, and locked it up again and kept the key. In *Re Craven's Estate, Lloyds Bank Ltd v Cockburn* [1937] Ch 423, [1937] 3 All ER 33, Farwell J said, at 428 and at 38, that if the donor retained a



duplicate key to a box there would probably be no effective delivery, for the donor would still be able to deal with the subject matter and could not be said to have parted with dominion. This decision was distinguished, however, in *Woodard v Woodard* [1995] 3 All ER 980, [1992] RTR 35, CA, in relation to an alleged gift mortis causa of a car. The gift was held to have been good where the donee already had possession of the car and one set of keys, but the registration document and a second set of keys (whose existence was uncertain) were not handed over. The question was said to be not so much one of dominion as one of evidence of intention. As to the status of a vehicle registration document see **CIVIL PROCEDURE** vol 11 (2009) PARA 928.

8 *Ward v Turner* (1752) 2 Ves Sen 431 at 442; *Re Wasserberg, Union of London and Smiths Bank Ltd v Wasserberg* [1915] 1 Ch 195.

9 *Re Craven's Estate, Lloyds Bank v Cockburn* [1937] Ch 423, [1937] 3 All ER 33.

10 *Birch v Treasury Solicitor* [1951] Ch 298, [1950] 2 All ER 1198, CA.

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### **274. Delivery in the case of choses or things in action.**

In the case of a gift mortis causa of a chose or thing in action, delivery is necessary unless there is a formal transfer to the donee, but as physical delivery is impossible, delivery of a document essential to its recovery may suffice<sup>1</sup>. The test whether a chose or thing in action is validly given is whether the document actually delivered constitutes the essential indicia or evidence of title, possession or production of which entitles the possessor to the money or the property purported to be given; it is not necessary that all the terms of the contract should be expressed in the document<sup>2</sup>. Dominion over the subject matter of the gift must be parted with<sup>3</sup>.

1 *Duckworth v Lee* [1899] 1 IR 405, CA. Even in the case of a formal transfer there would usually be delivery of the instrument of transfer, but in the case of inscribed stock it would appear that the transfer into the name of the donee would be sufficient: see the remarks of Lord Hardwicke LC in *Ward v Turner* (1752) 2 Ves Sen 431 at 443-444.

2 *Birch v Treasury Solicitor* [1951] Ch 298 at 311, [1950] 2 All ER 1198 at 1207, CA, where the court applied *Ward v Turner* (1752) 2 Ves Sen 431, and *Moore v Darton* (1851) 4 De G & Sm 517, and criticised *Re Weston, Bartholomew v Menzies* [1902] 1 Ch 680, and *Delgoffe v Fader* [1939] Ch 922, [1939] 3 All ER 682, in so far as the decisions in those cases stated that the test of the validity of the gift was that a record of all the essential terms of the contract should be contained in the document handed over. See also *Re Dillon, Duffin v Duffin* (1890) 44 ChD 76, CA; *Sen v Headley* [1991] Ch 425, [1991] 2 All ER 636, CA.

3 *Birch v Treasury Solicitor* [1951] Ch 298 at 304, [1950] 2 All ER 1198 at 1203, CA (bank deposit books handed over as gift of deposited sums; subsequent request by the donor that a bill owing by the donor should be paid by the donee). See also the cases cited in PARA 273 note 4.

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### **275. Examples of gifts mortis causa held to be good.**

The following documents have been held to satisfy the test and their delivery to operate as a good gift mortis causa of the property to which they refer: bank notes<sup>1</sup>; bankers' deposit notes, though unindorsed<sup>2</sup>; a deposit pass-book and a deposit account book<sup>3</sup>; bills of exchange payable to donor or order, though not due until after his death and not indorsed<sup>4</sup>; a bill drawn by the donor in favour of his wife to buy her mourning and to maintain her<sup>5</sup>; bonds<sup>6</sup>; certificates for building society shares<sup>7</sup>; cheques drawn by the donor and cashed in his lifetime<sup>8</sup> or handed

to a bank official in the donor's house<sup>9</sup>; cheques payable to donor or order, though not indorsed<sup>10</sup>; mortgage deeds<sup>11</sup>; policies of assurance<sup>12</sup>; a London Trustee Savings Bank book<sup>13</sup>; a National Savings Bank book as regards a cash deposit, but not as regards government stock referred to in it<sup>14</sup>, even though charged with an uncertain amount for payment of funeral expenses<sup>15</sup>; War Savings Certificates and National Savings Certificates<sup>16</sup>; promissory notes to order and not indorsed<sup>17</sup>; a mortgage without a covenant to pay<sup>18</sup>; registered victory bonds<sup>19</sup>; and an exchequer bond deposit book containing a certificate that the donor had been registered as the holder of bonds deposited with the Post Office<sup>20</sup>.

There may be a gift mortis causa of land where the donor has parted with dominion over the title deeds and the land in question<sup>21</sup>.

1 *Ashton v Dawson and Vincent* (1725) 2 Coll 363n; *Miller v Miller* (1735) 3 P Wms 356; *Hill v Chapman* (1789) 2 Bro CC 612.

2 *Amis v Witt* (1863) 33 Beav 619; *Moore v Moore* (1874) LR 18 Eq 474; *Re Farman, Farman v Smith* (1887) 58 LT 12; *Cassidy v Belfast Banking Co* (1887) 22 LR Ir 68, where the note was headed 'not transferable'; *Re Dillon, Duffin v Duffin* (1890) 44 ChD 76, CA; *Porter v Walsh* [1895] 1 IR 284; affd [1896] 1 IR 148, CA; *Hudson v Spencer* [1910] 2 Ch 285; *Birch v Treasury Solicitor* [1951] Ch 298, [1950] 2 All ER 1198, CA; cf *Delgoffe v Fader* [1939] Ch 922, [1939] 3 All ER 682.

3 *Birch v Treasury Solicitor* [1951] Ch 298, [1950] 2 All ER 1198, CA.

4 *Rankin v Weguelin* (1832) 27 Beav 309, where, however, it does not appear whether the bills were indorsed by the donor or his executors: *Re Mead, Austin v Mead* (1880) 15 ChD 651.

5 *Lawson v Lawson* (1718) 1 P Wms 441, approved in *Tate v Hilbert* (1793) 2 Ves 111 at 120, although the report in 1 P Wms is said to be inaccurate (see per Lord Loughborough LC in *Tate v Hilbert* at 120).

6 *Ashton v Dawson and Vincent* (1725) 2 Coll 363n; *Snellgrove v Baily* (1744) 3 Atk 214; *Gardner v Parker* (1818) 3 Madd 184, where it was held that the donee on indemnifying the executors could sue in their names; *Meredith v Watson* (1853) 2 Eq Rep 5 (bond under which the donee was the obligor).

7 *Birch v Treasury Solicitor* [1951] Ch 298, [1950] 2 All ER 1198, CA. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1908. Cf *Re Weston, Bartholomew v Menzies* [1902] 1 Ch 680.

8 *Bouts v Ellis* (1853) 17 Beav 121; affd 4 De GM & G 249; *Re Beaumont, Beaumont v Ewbank* [1902] 1 Ch 889 at 895, 897, where Buckley J said that it would be sufficient for the bank to undertake with the donee to hold the amount of the cheque for him.

9 *Re While, Wilford v While* [1928] WN 182.

10 *Clement v Cheesman* (1884) 27 ChD 631. The same applies even though they are 'stale': *Re Mulroy, M'Andrew v Mulroy* [1924] 1 IR 98.

11 *Duffield v Elwes* (1827) 1 Bli NS 497, HL.

12 *Amis v Witt* (1863) 33 Beav 619; *Hatley v Liverpool Victoria Legal Friendly Society* (1918) 118 LT 687; *Nelson v Prudential Assurance Co* [1929] NI 113 (endowment policy). But cf *Re Hughes* (1888) 59 LT 586, CA, where a document signed by the deceased was held to be testamentary.

13 *Birch v Treasury Solicitor* [1951] Ch 298, [1950] 2 All ER 1198, CA.

14 *Re Weston, Bartholomew v Menzies* [1902] 1 Ch 680; *Birch v Treasury Solicitor* [1951] Ch 298, [1950] 2 All ER 1198, CA.

15 *Re Ward, Ward v Warwick* [1946] 2 All ER 206.

16 *Darlow v Sparks* [1938] 2 All ER 235.

17 *Veal v Veal* (1859) 27 Beav 303.

18 *Wilkes v Allington* [1931] 2 Ch 104; see also *Hurst v Beach* (1821) 5 Madd 351.

19 *Re Richards, Jones v Rebbeck* [1921] 1 Ch 513.

20 *Re Lee, Treasury Solicitor v Parrott* [1918] 2 Ch 320.

21 *Sen v Headley* [1991] Ch 425, [1991] 2 All ER 636, CA, overturning the law as it had commonly been assumed to be since *Duffield v Elwes* (1827) 1 Bli NS 497, HL.

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## 276. Examples of attempted gifts mortis causa which have failed.

The following documents have been held not to pass the test and thus not to operate as good gifts mortis causa: certificates for railway stock<sup>1</sup>; cheques drawn by the donor and not presented in his lifetime<sup>2</sup>, though his bank pass-book is delivered with them<sup>3</sup>, or presented and not paid in his lifetime<sup>4</sup>; a cheque for part of the money on a deposit account<sup>5</sup>; an IOU<sup>6</sup>; investment certificates and National Savings Bank deposit books, so far as government stock is concerned<sup>7</sup>; receipts for government stock<sup>8</sup>; private savings bank books<sup>9</sup>; promissory notes drawn by the donor in favour of the donee<sup>10</sup>; Post Office Savings Certificates of the former Irish Free State<sup>11</sup>; and a deposit receipt which did not specify any rate of interest<sup>12</sup>.

1 *Moore v Moore* (1874) LR 18 Eq 474.

2 *Hewitt v Kaye* (1868) LR 6 Eq 198; *Re Davis, Griffith v Davis* (1902) 86 LT 889. See dictum of Sargant J in *Re Leaper, Blythe v Atkinson* [1916] 1 Ch 579 at 583. This is recognised as law, in spite of Lindley LJ's statement in *Re Dillon, Duffin v Duffin* (1890) 44 ChD 76 at 83, CA, that the effect of a person giving his own cheque 'may some day require consideration'. It appears that if a cheque drawn by the donor and delivered to the donee is paid away by the donee either for valuable consideration or in discharging a debt of his own, or if the donee receives the amount for which it is drawn, immediately after the donor's death, before the bank is apprised of it, the gift is good: see *Tate v Hilbert* (1793) 2 Ves 111 at 118; *Rolls v Pearce* (1877) 5 ChD 730. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1404.

3 *Re Beak's Estate, Beak v Beak* (1872) LR 13 Eq 489. But cf *Birch v Treasury Solicitor* [1951] Ch 298, [1950] 2 All ER 1198, CA.

4 *Re Beaumont, Beaumont v Ewbank* [1902] 1 Ch 889, where the bank would probably have honoured the cheque if satisfied as to the signature. It makes no difference that there is sufficient money in the drawer's account to meet the cheque: *Re Swinburne, Sutton v Featherley* [1926] Ch 38, CA (incomplete gift inter vivos).

5 *Re Mead, Austin v Mead* (1880) 15 ChD 651.

6 *Duckworth v Lee* [1899] 1 IR 405, CA, disapproving Lord Romilly's dictum in *Hewitt v Kaye* (1868) LR 6 Eq 198 at 200.

7 *Re Andrews, Andrews v Andrews* [1902] 2 Ch 394, criticised in *Re Lee, Treasury Solicitor v Parrott* [1918] 2 Ch 320.

8 *Ward v Turner* (1752) 2 Ves Sen 431 (South Sea annuities); *Re M'Wey, Ryan v Cashin and Costello* [1928] IR 486 (receipt by Bank of England to transferee of India 5½% stock and receipt by Bank of Ireland to transferee of 3% local loans stock).

9 *M'Gonnell v Murray* (1869) IR 3 Eq 460, as explained by *Re Weston, Bartholomew v Menzies* [1902] 1 Ch 680. The private savings bank books in question were those governed by the Trustee Savings Banks Act 1863 (repealed); see now the Trustee Savings Banks Act 1985; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 809. But cf *Birch v Treasury Solicitor* [1951] Ch 298, [1950] 2 All ER 1198, CA; and PARA 275 text to note 13; and see also PARA 274 text and notes 2-3.

10 *Holliday v Atkinson* (1826) 5 B & C 501; *Re Leaper, Blythe v Atkinson* [1916] 1 Ch 579.

11 *Mills v Shields (No 2)* [1950] IR 21, where it was also held that the certificates of stocks and shares of public companies registered in England and Ireland are not documents of such a nature that delivery of them can constitute a valid gift mortis causa. As to gifts of shares see PARA 233.

12 *Re Foran, Lenihan v Mahoney* (1950) 84 ILT 187.

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### **277. Revocation of gift mortis causa.**

If the donor resumes possession, the gift is ended<sup>1</sup>, but this does not apply where the donor, with the consent of or at the request of the donee, merely takes charge of the subject matter of the gift<sup>2</sup>. The mere fact of a legacy's being given to the donee of an amount equal to a previous gift mortis causa is not of itself a revocation of the gift<sup>3</sup>. The legacy may be a satisfaction of the prior gift if the circumstances show that this was the testator's intention: for example, it may be a satisfaction where the doctrine of double portions applies, or if the gift is made in satisfaction of a creditor's debt and a legacy of equal amount is given to that creditor<sup>4</sup>. If, however, there are no circumstances showing such an intention, the donee will be entitled both to the legacy and to the gift<sup>5</sup>. The same principle applies where the legacy was given by a will executed before the gift mortis causa was given<sup>6</sup>. In principle, the donor should be able to revoke a gift by giving notice and dicta can be found which give rather weak support to this view, although there appears to be no actual decision where revocation by notice has occurred<sup>7</sup>.

It is thought, however, that a donor cannot revoke a gift mortis causa by will, for death makes the gift complete<sup>8</sup>.

1 *Bunn v Markham* (1816) 7 Taunt 224 at 232; *Cant v Gregory* (1894) 10 TLR 584, CA.

2 *Re Taylor, Taylor v Taylor* (1887) 56 LJCh 597; *Re Hawkins, Watts v Nash* [1924] 2 Ch 47.

3 *Hudson v Spencer* [1910] 2 Ch 285. *Jones v Selby* (1710) Prec Ch 300 is not an authority to the contrary, for Lord Harcourt by his judgment in that case only meant that the legacy there was intended to be in satisfaction of the previous provision made for the legatee: see *Hudson v Spencer* at 290. The last-mentioned case supplies the answer to the third question raised in the headnote to *Hambrooke v Simmons* (1827) 4 Russ 25.

4 *Hudson v Spencer* [1910] 2 Ch 285 at 290 per Warrington J.

5 *Hudson v Spencer* [1910] 2 Ch 285 at 290. See also **EQUITY** vol 16(2) (Reissue) PARA 739 et seq; **WILLS** vol 50 (2005 Reissue) PARA 445 et seq.

6 *Miller v Miller* (1735) 3 P Wms 356.

7 See *Jones v Selby* (1710) 2 Eq Cas Abr 573, Pre Ch 300; *Bunn v Markham* (1816) 7 Taunt 224; *Walter v Hodge* (1818) 1 Wils Ch 445, 2 Swans 92; *Re Korvine's Trust* [1921] 1 Ch 343.

8 See *Jones v Selby* (1710) 2 Eq Cas Abr 573, Pre Ch 300.

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### **278. Liability to debts and duties.**

Gifts mortis causa, being in the nature of legacies, are subject to the donor's debts in case of a deficiency of assets<sup>1</sup>. They are also subject to inheritance tax and capital gains tax in the same manner as gifts inter vivos<sup>2</sup>.

1 *Smith v Casen* (1718) 1 P Wms 406; *Ward v Turner* (1752) 2 Ves Sen 431 at 434; *Tate v Hilbert* (1793) 2 Ves 111 at 120; *Tate v Leithead* (1854) Kay 658. But a gift mortis causa has been held not to be liable as assets for payment of the costs of unsuccessful proceedings to obtain probate: see *Kelly v O'Connor* [1917] 1 IR 312; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 329.

2 See PARA 203.